

Diminished Future Earning Capacity (DFEC) Evaluations

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History of diminished future earning capacity

First reference to earning capacity: 1898 in Germany



The German Invalidity and Pension Law of 1898

"In 1898, when addressing work disability, the government decided that disability was a function of lost earning capacity and job opportunity, and not as narrowly interpreted in the English Poor Laws, a categorical incapacity to work."

(Demeter, S.L., Andersson, G. B. J.,
Disability Evaluation, 2nd ed., 2003)

I. Overview of Ability to Compete and Diminished Future Earning Capacity

- A. RAND study of the 1997 *Schedule for Rating Permanent Disabilities*
- B. The *LeBoenf* case and 100% permanent disability ratings
- C. Labor Code section 4662

I. Overview of Ability to Compete and Diminished Future Earning Capacity

- C. Labor Code section 4662 states:

Any of the following permanent disabilities shall be conclusively presumed to be total in character:

- (a) Loss of both eyes or the sight thereof.
- (b) Loss of both hands or the use thereof.
- (c) An injury resulting in a practically total paralysis.
- (d) An injury to the brain resulting in incurable mental capacity or insanity.

I. Overview of Ability to Compete and Diminished Future Earning Capacity

- C. Labor Code section 4662 states further:

In all other cases, permanent total disability shall be determined in accordance with the fact. **Leg.H.** 2007 ch. 31 (AB 1640) §2. (pp.346,347)

The fact(s) can include a combination of medical and vocational evidence.

I. Overview of Ability to Compete and Diminished Future Earning Capacity

- D. SB 899 and the 2005 *Schedule for Rating Permanent Disabilities*
1. Replaced diminished ability to compete with diminished future earning capacity

- E. AMA *Guides* and DFEC

I. Overview of Ability to Compete and Diminished Future Earning Capacity

F. *Ogilvie I*, February 3, 2009

1. A prescribed mathematical formula to use in attempting to rebut the FEC adjustment factor in the *Schedule*

G. *Ogilvie II*, September 3, 2009

1. Upheld *Ogilvie I*

I. Overview of Ability to Compete and Diminished Future Earning Capacity

H. *Shini*, January 25, 2010 and *Noriega Garcia*, March 1, 2010

1. Applicant's actual post-injury earnings not acceptable in these cases in determining proportional earnings loss
2. *Montana* (1962) factors must be applied in attempting to rebut the *Schedule*

I. Overview of Ability to Compete and Diminished Future Earning Capacity

I. *Montana* factors

- A. Ability to work
- B. Age
- C. Health
- D. Willingness and opportunities to work
- E. Skills and education
- F. General conditions of the labor market
- G. Employment opportunities for persons similarly situated

I. Overview of Ability to Compete and Diminished Future Earning Capacity

J. *Ogilvie III*, July 29, 2011

- 1. The 2005 *Schedule* is rebuttable in three ways

I. Overview of Ability to Compete and Diminished Future Earning Capacity

K. Rebutting the 2005 *Schedule* under *Ogilvie III*

1. A factual error
2. Omission of medical complications aggravating the employee's disability
3. Not amenable to rehabilitation – a *LeBoeuf* approach

I. Overview of Ability to Compete and Diminished Future Earning Capacity

L. Impermissible non-industrial factors in *Ogilvie III*

1. General economic conditions
2. Illiteracy
3. Proficiency to speak English
4. Lack of education

II. Relevant Court Decisions since July 29, 2011

A. *Bakerian v. WCAB, et al.* (Writ denied August 16, 2011)

1. Applicant failed to rebut the *Schedule*
 - a. Only 7-8 months from P&S date to trial date
 - b. Applicant did not testify regarding other skills or education he possessed
 - c. Applicant did not address reasons why he stopped working
 - d. No evidence regarding job opportunities available to the applicant
 - e. Vocational expert's testimony that applicant was unemployable did not constitute substantial evidence to rebut the FEC factor

II. Relevant Court Decisions since July 29, 2011

B. *Regents of the University of California v. WCAB (Siegel)* (Writ denied October 17, 2011)

1. 100% disability award, unapportioned
 - a. LC 4662 "in accordance with the facts"
 - b. AME's opinion. Lost 70% use of right hand and 90% use of left hand
 - c. Credible testimony by applicant's VE that applicant was unable to compete in the open labor market
 - d. Apportionment was inappropriate when PTD was based on inability to compete in the open labor market

II. Relevant Court Decisions since July 29, 2011

C. Cordova v. Garaventa Enterprises; SCIF (October 25, 2011 Panel Decision)

1. 100% disability award upheld
2. Labor Code section 4662, in accordance with the fact applied although the WCJ did not specifically cite LC 4662
3. WCJ concluded “that the sole cause of applicant’s total loss of earning capacity is his medical condition.”
4. Applicant’s inability to speak and understand English did not contribute to 100% disability.
5. LC 4662 applies to 100% cases.
6. LC 4660 applies to partial disability cases.

II. Relevant Court Decisions since July 29, 2011

D. Wen v. Gagmar’s, Inc. and Springfield Insurance, (November 4, 2011 Findings of Fact, Award, Opinion on Decision)

1. CVC 37% rating (orthopedic and psyche) increased to 70% with vocational evidence
2. Comparison of applicant’s DOI earnings with his actual post-injury earnings
3. VE disagreed over the number of hours worked per week post-injury

II. Relevant Court Decisions since July 29, 2011

E. *Gonzalez v. William Mc Cullock, SCIF* (December 13, 2011, Findings and Award and Opinion on Decision)

1. Prior Stipulations with Request for Award of 8% increased to 73% with vocational evidence.
2. Applicant's VE's fees were reasonable.
3. Laborer with relatively high wages able to work only at unskilled low paying jobs post-injury.
4. WCJ found one year of post-P&S wages to be sufficient.

Use of a Vocational Expert

Case Factors in Determining Use of Vocational Expert

For Applicant

For Defendant

Indicators for use by Applicant

1. Medically unable to return to pre-injury job
2. Injuries to multiple body parts
3. High pre-injury wage and a low expected post-injury wage
4. Not vocationally feasible or amenable to rehabilitation
5. Limited to part time work
6. Need for mobility aids
7. Appears to be permanently and totally disabled

Indicators for Use by Defendant

1. Evaluated by an applicant's vocational expert
2. Able to return to the pre-injury job
3. Expected post-injury wages appear comparable to pre-injury wages
4. Applicant appears employable but has not returned to work
5. A claim for permanent and total disability is likely

Timeliness and Content of Referral

1. Medical records, including medical restrictions, functional limitations, psychiatric impairments or other limitations
2. Job description for the DOI occupation
3. Employment and school records ,if available, including any post-injury
4. Stipulated occupation at DOI, if available
5. Stipulated average weekly wage at DOI, if available
6. Employer's Earnings Statement for the year before the injury
7. W-2 Wage and Tax Statements for 3-5 years before the DOI
8. Social Security Administration Earnings Statement
9. Records of any return to work efforts
10. Employment and wage records for any concurrent employment at DOI

Types of Vocational Evaluations

1. Preliminary Records Only-opinion for settlement
2. Comprehensive LeBoeuf Vocational Expert Evaluation
3. Comprehensive Diminished Future Earning Capacity (DFEC) - Evaluation
Claim less than 100%
4. Combination DFEC, LeBoeuf, and L.C.4662 Evaluation for 100%
5. Vocational Expert Deposition and Trial Testimony Services

Session 2

February 24 and March 6, 2012

1. Developing an opinion on DFEC
2. Application of opinion on DFEC

IV. Determining the percentage of DFEC by a vocational expert (VE)

A. Information needed to conduct a DFEC evaluation under *Ogilvie III*

1. Medical records from the physicians the judge will follow
2. Functional limitations, medical restrictions, psychiatric impairments, etc.
3. Work history with job duties, hours, job description of the DOI occupation, etc.
4. Wages. AWW, W-2 statements, payroll stubs, SSA earnings statements, etc.

IV. Determining the percentage of DFEC by a vocational expert (VE)

B. Comprehensive interview

1. Personal/social
2. Financial
3. Medical
4. Response to injury
5. School history
6. Work history
7. Self-initiated return to work efforts

IV. Determining the percentage of DFEC by a vocational expert (VE)

C. Vocational testing

1. Necessary to assess whether the applicant is amenable to rehabilitation for a 100% claim
2. May be needed for an evaluation regarding the omission of medical complications aggravating the employee's disability

IV. Determining the percentage of DFEC by a vocational expert (VE)

C. Vocational testing

3. Necessary to clarify any impermissible non-industrial factors related to illiteracy, proficiency to speak English, or lack of education
4. Necessary to evaluate concerns about a learning disability
5. Necessary to clarify whether the applicant can increase his or her post-injury earning capacity through training

IV. Determining the percentage of DFEC by a vocational expert (VE)

D. Complete a Transferable Skills Analysis

1. With all medical and vocational information to assess whether the applicant is amenable to rehabilitation
2. Using the work history profile method to eliminate consideration of impermissible non-industrial vocational factors

IV. Determining the percentage of DFEC by a vocational expert (VE)

E. Determine vocational feasibility

1. Necessary to assess whether the applicant is amenable to rehabilitation
2. May be needed for an evaluation regarding the omission of medical complications aggravating the employee's disability

IV. Determining the percentage of DFEC by a vocational expert (VE)

F. Analyze employability

1. Labor market access (LMA)
 - a. Medical labor market access
 - b. Vocational labor market access and placeability
2. Labor market survey (LMS)

IV. Determining the percentage of DFEC by a vocational expert (VE)

G. Finalize an opinion on employability

1. Is the applicant able to work in the open labor market? Yes or no.
2. If yes, list the most suitable job options.

IV. Determining the percentage of DFEC by a vocational expert (VE)

H. *Montana* factors

- A. Ability to work
- B. Age
- C. Health
- D. Willingness and opportunities to work
- E. Skills and education
- F. General conditions of the labor market
- G. Employment opportunities for persons similarly situated

IV. Determining the percentage of DFEC by a vocational expert (VE)

I. Assess earning capacity

- A. Pre-injury earning capacity
 - 1. Wage at DOI
 - 2. Another wage, if appropriate
 - 3. Determine the wage of similarly situated employees.

IV. Determining the percentage of DFEC by a vocational expert (VE)

B. Post-injury earning capacity

1. Based on the wage of job options through direct job placement
2. Based on the wage of job options following vocational training

IV. Determining the percentage of DFEC by a vocational expert (VE)

J. DFEC analysis

WCEC Formula (Van de Bittner, 2006)

$$\text{DFEC} = f(\text{WLE}) \times \frac{[\text{PRE} - \text{POST}]}{\text{PRE}}$$

where:

DFEC = diminished future earning capacity

WLE = worklife expectancy

PRE = pre-injury earning capacity

POST = post-injury earning capacity

f = function of

V. Sample Case: Cameron S. Streeter

- A. Ironworker with a disability. Limited to semi-sedentary work and other orthopedic limits. Minor hearing impairment. No work at heights. Mild psychiatric impairment.
- B. Most suitable post-injury jobs through direct job placement: Cashier and lobby attendant

V. Sample Case: Cameron S. Streeter

C. Worklife expectancy

1. MMI date: 11/15/10 (Dr. Green)
2. Age on 11/15/10: 50 years, 1 month
3. Worklife expectancy on 11/15/10: 11.61 years (Skoog & Ceicka, 2001)

V. Sample Case: Cameron S. Streeter

D. Pre-injury earning capacity (earning capacity of the control group of similarly situated employees)

1. W-2 forms for 2004 and 2005 = average annual wage of approximately \$50,000.00
2. California EDD wage for iron workers earning \$50,000.00 per year is \$24.51 per hour. This is the wage of the control group of similarly situated employees

V. Sample Case: Cameron S. Streeter

E. Post-injury earning capacity

1. Average wage of cashiers and lobby attendants
2. Start at the 50th percentile
3. Advance to the 75th percentile after 3 years
4. RTW after a 6 month job search

V. Sample Case: Cameron S. Streeter

F. Post-injury wages

1. Hourly wage for the first 3 years: \$8.39
2. Hourly wage after 3 years: \$10.05
3. Hourly wage for the first 3.5 years: \$7.90
4. Hourly wage for the remainder
of worklife: \$10.05

V. Sample Case: Cameron S. Streeter

G. DFEC calculation

1. Wages for the first 3.5 years: \$57,512.00
2. Plus wages for the next
8.11 years: \$169,531.44
3. Equals total FEC (post-
injury earning capacity): \$227,043.44

V. Sample Case: Cameron S. Streeter

H. DFEC calculation (continued)

4.	Pre-injury earning capacity (control group earnings from MMI through worklife):	\$591,884.80
5.	Less post-injury earning capacity from MMI through worklife:	\$227,043.44
6.	Equals DFEC:	\$364,841.36
7.	Percentage of DFEC:	62%

V. Sample Case: Cameron S. Streeter

I. DFEC calculation (continued)

8.	Job search costs counselor fees, mileage, etc. (subtract voucher):	\$7,750.00
9.	Percentage of DFEC, with job search costs:	63%

V. Sample Case: Cameron S. Streeter

J. Jobs following vocational training

K. Most suitable post-injury job following vocational training: Drafter

V. Sample Case: Cameron S. Streeter

L. Post-injury earning capacity

1. Average wage of drafters
2. Start at the 25th percentile
3. Advance to the 50th percentile after 3 years
4. RTW after 2 years of training and 6 months of job search activities following MMI

V. Sample Case: Cameron S. Streeter

M. Post-injury wages

1. Hourly wage for the first 3 years: \$16.90
2. Hourly wage after 3 years: \$21.98
3. Hourly wage for the first 5.5 years: \$10.60
4. Hourly wage for the remainder
of worklife: \$21.98

V. Sample Case: Cameron S. Streeter

N. DFEC calculation

1. Wages for the first 5.5 years: \$121,264.00
2. Plus wages for the next
6.11 years: \$279,339.42
3. Equals total FEC (post-
injury earning capacity): \$400,603.42

V. Sample Case: Cameron S. Streeter

O. DFEC calculation (continued)

4.	Pre-injury earning capacity (control group earnings from MMI through worklife):	\$591,884.80
5.	Less post-injury earning capacity from MMI through worklife:	\$400,603.42
6.	Equals DFEC:	\$191,281.38
7.	Percentage of DFEC:	32%

V. Sample Case: Cameron S. Streeter

P. DFEC calculation (continued)

8.	Training and job search costs counselor fees, mileage, etc. (subtract voucher):	\$29,200.00
9.	Percentage of DFEC, with job search costs:	37%

VI. Application of Opinion on DFEC Percentage

- A. DFEC = PD
- B. DFEC replaces the FEC adjustment factor in the *Schedule*
- C. Other options.

VI. Application of Opinion on DFEC Percentage

The resulting percentage of DFEC for Mr. Streeter can be used as a substitute for the permanent disability rating in the 2005 *Schedule for Rating Permanent Disabilities* since the percentage of DFEC considers physical impairment, age, occupation, and earning capacity, unless the DFEC percentage is less than the rating under the *Schedule* after adjusting for age, occupation, and FEC.

VI. **Application of Opinion on DFEC Percentage**

Should this occur, the DFEC percentage can be used as a substitute for the FEC adjustment factor in the *Schedule*. Or, the percentage of DFEC for Mr. Streeter can be applied to the formula at page 1-6 in the 2005 *Schedule for Rating Permanent Disabilities* when combined with the unadjusted permanent disability rating.

VII. **When to request a DFEC evaluation**

- A. For the applicant
 - 1. Once a decision is made to attempt to rebut the *Schedule*
- B. For the defendant
 - 1. Before the MSC!
 - 2. At the final MMI or P&S date
 - 3. When the applicant has retained a VE
 - 4. Earlier for complex cases so the VE can consult with the attorney

VIII. Agreed Vocational Evaluation

A. Benefits

1. About half the cost of 2 evaluations
2. Less need for trial testimony by a VE

B. Negatives

1. No opportunity for individual consultation with the VE

IX. Final remarks

A. Questions and answers

B. Thank you for listening

Diminished Future Earning Capacity Evaluations Agenda

February 23 & March 5, 2012 – Session 1

Agenda

- I. Overview of Ability to Compete and Diminished Future Earning Capacity
 - A. LeBouef & Ogilvie I, II, III Labor Code Section 4662
 - B. Relevant Court Decisions since July, 2011
- II. Use of a Vocational Expert
 - A. Case Factors in Determining Use of Vocational Expert
 - B. Timelines and Content of Referral
 - C. Types of Vocational Evaluations and Testimony
- III. Question and Answer Session

February 24 & March 6, 2012 – Session 2

Agenda

- I. Developing an Opinion
 - A. Review of Case Related Documents
 - B. Client Interview
 - C. Transferable skills analysis/Testing
 - D. Labor Market/Earnings Data Collection
 - E. Applying numeric formulas
- II. Application of opinion and Diminished Future Earning Capacity.

LAWS, REGULATIONS, AND COURT DECISIONS RELATED TO DIMINISHED FUTURE EARNING CAPACITY (DFEC) AND *OGILVIE*

**Eugene E. Van de Bittner, Ph.D.
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Abstract

An understanding of the underlying laws, regulations, and court decisions related to diminished future earning capacity is important both in conducting a vocational evaluation and in reviewing the analysis and opinions presented by a vocational expert. This article provides the reader excerpts of key laws, regulations, and court decisions regarding diminished future earning capacity in the California workers' compensation system.

About the Author

Eugene E. Van de Bittner, Ph.D. is a certified rehabilitation counselor, a certified life care planner, and is a certified vocational expert by the American Board of Vocational Experts (ABVE). He served as president of the California Association of Rehabilitation and Reemployment Professionals (CARRP) in 1983. He was president of the American Board of Vocational Experts in 1997. He has also served on the Ethics Committee of CARRP and ABVE and currently serves on the Credentials Committee for ABVE. He is the current Chair of the Legislative Committee for the California Chapter of the International Association of Rehabilitation Professionals.

Dr. Van de Bittner was the managing editor of a special issue of the *Journal of Forensic Vocational Analysis* in which several vocational experts researched and reported on the use of vocational expert opinion and testimony in their respective state workers' compensation systems. He is the author of several peer-reviewed, published journal articles related to the evaluation of employability and earning capacity. Dr. Van de Bittner is currently serving as a co-editor of a special issue of *The Rehabilitation Professional* regarding diminished future earning capacity. He has testified at the Workers' Compensation Appeals Board throughout Northern California, as well as at Superior Court in California, and at U.S. District Court. He is a frequent invited presenter on topics related to employability and earning capacity.

Laws, Regulations, and Court Decisions Related to Diminished Future Earning Capacity (DFEC) and *Ogilvie*

Abstract

An understanding of the underlying laws, regulations, and court decisions related to diminished future earning capacity is important both in conducting a vocational evaluation and in reviewing the analysis and opinions presented by a vocational expert. This article provides the reader excerpts of key laws, regulations, and court decisions regarding diminished future earning capacity in the California workers' compensation system.

Introduction

The purpose of this article is to provide the reader a single resource that includes pertinent laws, regulations, and court decisions regarding diminished future earning capacity (DFEC) related to the California workers' compensation system. Excerpts of the actual language in the laws, regulations and court decisions from the source documents are provided.

Laws, Regulations and Court Decisions Regarding DFEC

Senate Bill 899

Senate Bill 899, a comprehensive workers' compensation bill, was signed into law on April 19, 2004 by California governor Schwarzenegger (California Workers' Compensation Institute, 2004, April 20). As required by Senate Bill 899, Labor Code section 4660 (Bae, 2012) was modified and reads as follows:

- (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.
- (b)(1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).
- (2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim

Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.

(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision. **Leg.H.** 1993 ch. 121, effective July 16, 1993, 2004 ch. 34 (SB 899), effective April 19, 2004. (p. 345, 346)

Of significance, paragraph (a) notes that determining the percentage of permanent disability shall consider “an employee’s diminished future earning capacity.” Paragraph (b)(2) defines diminished future earning capacity as “a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees.”

Finally, paragraph (c) confirms that the rating schedule developed by the administrative director “shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.” This means that the rating schedule is rebuttable.

Labor Code section 4662 addresses the presumption of permanent and total disability related to certain medical conditions and was unchanged in SB 899. Labor Code section 4662 states:

Any of the following permanent disabilities shall be conclusively presumed to be total in character:

- (a) Loss of both eyes or the sight thereof.
- (b) Loss of both hands or the use thereof.
- (c) An injury resulting in a practically total paralysis.

- (d) An injury to the brain resulting in incurable mental capacity or insanity.

In all other cases, permanent total disability shall be determined in accordance with the fact. **Leg.H.** 2007 ch. 31 (AB 1640) §2. (pp. 346, 347)

The last paragraph in Labor Code section 4662 is relevant to an evaluation of employability and earning capacity regarding a claim for permanent and total disability. Workers' compensation judges can consider all of the medical and vocational facts of a case in rendering a decision regarding a claim for permanent and total disability.

2003 RAND Report

In its *Evaluation of California's Permanent Disability Rating Schedule, Interim Report* (December 2003), the RAND Institute for Civil Justice studied over 300,000 cases that were rated prior to the 2005 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation, 2005), as follows:

In this study, we use data on over 300,000 PPD ratings in California; all cases rated by the Disability Evaluation Unit (DEU) with an injury date between January 1, 1991, and April 1, 1997. Since several years of post-injury earnings must be observed to estimate earnings losses, injuries occurring after April 1, 1997, are not used. We are able to match most (over 69%) of the injured workers in this sample to both (1) similar workers and (2) to administrative data on wages from the Employment Development Department (EDD) to estimate the impact on earnings experienced by these workers. Thus, we are able to create a database that includes the type of impairment, disability rating, and the estimated earnings losses for 241,685 PPD claimants in California injured from January 1, 1991, to April 1, 1997.

Using these data, we can compare the disability ratings produced by the DEU to the observed earnings outcomes. In the past, disability rating systems lacked an empirical basis to support the ranking of impairments. In this study, earnings loss estimates provide a direct measure of how a permanent disability affects an individual's ability to compete in the labor market. (p. 18)

The 2003 RAND report described the control group of workers in the study as follows:

Our procedure for estimating wage loss involves linking injured workers to a control group of workers at the same firm with similar pre-injury earnings. We then compare the earnings of the injured workers after the date of injury to the earnings of their (uninjured) control workers. The difference between the earnings of the control workers and the earnings of the injured worker is the estimated earnings losses. Dividing losses by the control group's earnings

(representing what the injured worker would have received if he or she had never been injured) we obtain an estimate of *proportional earnings losses*. (p. 19)

The 2003 RAND report also addressed only single-impairment cases for the reasons outlined below:

If the system performs adequately, then we would expect higher ratings to be associated with higher average earnings losses. As a first step in our analysis, we compare the three-year proportional earnings losses for all single-impairment, summary-rated injuries to the disability rating. *Summary ratings* are ratings based on medical reports by impartial, randomly assigned physicians and Agreed Medical Evaluators (AME). The figure matches proportional earnings losses to what we call the *standard rating*, which is essentially the measure of impairment, and the *final rating*, which includes all modifiers for age and occupation and all subjective add-ons. We focus only on single-impairment cases because cases involving multiple impairments have multiple standard and intermediate ratings (the final rating is computed for multiple impairment cases by applying a complicated formula to the different ratings). Finally, we estimate earnings losses for impairments with ratings in ranges of ten percentage points (i.e., 1 to 10, 11 to 20, etc.). Because of missing data, we have slightly different sample sizes for each rating. We have 70,895 observations with a standard rating; 68,192 with an intermediate rating; and 68,295 observations with a final rating. (p. 21)

The 2003 RAND report considered only a 3-year timeframe of proportional earnings losses by noting:

Targeting higher benefits to more severe impairments is only one objective of the rating schedule; another is to ensure that the ratings are distributed equitably between different types of impairments. From the results of Reville et al. (2002b), we know that there are substantial inequities between the ratings assigned to different upper extremity impairments. Here, we conduct a similar analysis using four major impairment categories: shoulder impairments (the largest specific upper-extremity impairment), knee impairments (the largest specific lower-extremity impairment), loss of grasping power (GP) and back impairments (specifically, impairments to the neck, spine or pelvis). Again, we limit the analysis to single-impairment, summary-rated cases and consider three-year proportional earnings losses. Here, we group impairments with final ratings from 1 to 5, 6 to 10, 11 to 15, and so on up to 35; all ratings over 35 are grouped together (over 85 percent of single-impairment claims have final ratings of 35 or below). (p. 23)

2005 Schedule

On January 1, 2005, a new *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005) became effective. The *Schedule*

included an adjustment factor for diminished earning capacity that is to be applied to the whole person impairment rating by injury category. The application of the adjustment factor for future earning capacity (FEC) is described in Chapter 1 of the *Schedule* as follows:

3. *Adjustment for Diminished Future Earning Capacity*

The adjustment for diminished future earning capacity (FEC) is applied to the impairment standard in accordance with procedures outlined in section 2 of the Schedule. An impairment must be expressed using the whole person impairment scale before applying the FEC adjustment.

The methodology and FEC Adjustment table is premised on a numerical formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The empirical data was obtained from the interim report, "Evaluation of California's Permanent Disability Rating Schedule (December 2003), prepared by the RAND Institute for Justice. The result is that the injury categories are placed into different ranges (based on the ratio of standard ratings to proportional wage losses). Each of these ranges will generate a FEC adjustment between 10% and 40% for each injury category.

(a) Summary of Methodology:

1. RAND data was used to establish the ratio of average California standard ratings to proportional wage losses for each of 22 injury categories. (*Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899*, December 2004, RAND Institute for Civil Justice, Seabury, Reville, Neuhauser.) These ratios are listed in Table B below.

2. The range of the ratios for all injury categories is .45 to 1.81. This numeric range was divided into eight evenly spaced ranges. (See the Range of Ratios columns in Table A below.) Each injury category will fall within one of these eight ranges, based on its rating/wage loss ratio.

3. A series of FEC adjustment factors were established to correspond to the eight ranges described above. (See column 4 of Table A below.) The smallest adjustment factor is 1.1000 which will result in a 10% increase when applied to the AMA whole person impairment rating. The largest is 1.4000 which will result in a 40% increase. The six intermediate adjustment factors are determined by dividing the difference between 1.1 and 1.4 into seven equal amounts.

4. The formula for calculating the maximum and minimum adjustment factors is $([1.81/a] \times .1) + 1$ where a equals the minimum or maximum rating/loss ratio from Table B below. AMA whole person impairment ratings for injury categories that

correspond to a greater relative loss of earning capacity will receive a higher FEC adjustment. For example, a psychiatric impairment receives a higher FEC adjustment because RAND data shows that a relatively high wage loss corresponds to the average psychiatric standard permanent disability rating. A hand impairment would receive a lower FEC adjustment because RAND data shows a relatively low wage loss relative to the average psychiatric standard permanent disability rating.

The FEC rank and adjustment factors that correspond to relative earnings for the eight evenly-divided ranges are listed below in Table A. The ratio of earnings to losses and the corresponding rank for each injury category are listed below in Table B. To adjust an impairment standard for earning capacity, multiply it by the appropriate adjustment factor from Table B and round to the nearest whole number percentage. Alternatively, a table is provided at the end of Section 2 of the Schedule which provides the earning capacity adjustment for all impairment and FEC ranks.

Table A

Range of Ratios			
Low	High	FEC Rank	Adjustment Factor
1.647	1.810	One	1.1000
1.476	1.646	Two	1.1429
1.305	1.475	Three	1.1857
1.134	1.304	Four	1.2286
0.963	1.133	Five	1.2714
0.792	0.962	Six	1.3143
0.621	0.791	Seven	1.3571
0.450	0.620	Eight	1.4000

Table B

Part of the Body	Ratio of Rating Over Losses	FEC Rank
Hand/fingers	1.810	One
Vision	1.810	One
Knee	1.570	Two
Other	1.530	Two
Ankle	1.520	Two
Elbow	1.510	Two

Loss of grasping power	1.280	Four
Wrist	1.210	Four
Toe(s)	1.110	Five
Spine Thoracic	1.100	Five
General lower extremity	1.100	Five
Spine Lumbar	1.080	Five
Spine Cervical	1.060	Five
Hip	1.030	Five
General upper extremity	1.000	Five
Heart disease	0.970	Five
General Abdominal	0.950	Six
PT head syndrome	0.930	Six
Lung disease	0.790	Seven
Shoulder	0.740	Seven
Hearing	0.610	Eight
Psychiatric	0.450	Eight

The FEC Rank for the “Other” category is based on average ratings and proportional earning losses for the following impairments:

Impaired rib cage
Cosmetic disfigurement
General chest impairment
Facial disfigurement or impairment
Impaired mouth or jaw
Speech impairment
Impaired nose
Impaired nervous system
Vertigo
Impaired smell
Paralysis
Mental Deterioration
Epilepsy
Skull aperture (pp. 1-6 – 1-8)

Ogilvie I

In *Ogilvie* (2009, February 3), a decision that is commonly referred to as *Ogilvie I*, an en banc decision (including the opinions of all 7 commissioners), the Workers’ Compensation Appeals Board (WCAB) concluded:

For the reasons below, we hold in summary that: (1) the DFEC portion of the 2005 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by establishing the percentage to which an injured employee’s future earning capacity has been diminished; (3) the DFEC portion of

the 2005 Schedule is *not* rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, and then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating; and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor Code section 4660 — including section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers.³ Further, the DFEC rebuttal approach that is consonant with section 4660 and the RAND data to which it refers consists, in essence, of: (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department (EDD); (2) doing some simple mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss; (3) dividing the employee's whole person impairment by the proportional earnings loss to obtain a ratio; and (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination of the employee's DFEC adjustment factor is simple and relates back to the Schedule. If it does not, then a non-complex formula is used to perform a few additional calculations to determine an individualized DFEC adjustment factor. (pp. 1-2)

Ogilvie I provides the method for determining an injured employee's post-injury earnings, as follows:

In determining an individual employee's proportional earnings loss, the first step ordinarily will be to establish the employee's actual earnings in the three years following his or her injury (as did the RAND studies), using the employee's EDD wage data or other empirical wage information. Generally, this will be accomplished by having the employee obtain his or her wage information from EDD (Unemp. Ins. Code, § 1094(e)), either voluntarily or through an order compelling. However, other empirical earnings information also may be used, including earnings records from the Social Security Administration. . . (p. 22)

Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period. This is because the 2003 and 2004 RAND Studies used three-year proportional earnings losses only "because these data provide the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct [an] analysis" for a large scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate. For example, if an employee's injury results in a long period of temporary disability, then it might be appropriate to use a longer period than three years — or a three-year period with a starting date later than the date of injury, such as the injured employee's permanent and stationary date — for assessing the injured employee's "long-term loss of income." (Lab. Code, § 4660(b)(2).) As another example, where an injured employee becomes permanent and stationary

(i.e., reaches maximum medical improvement) shortly after the date of his or her industrial injury, then an attempt to rebut the DFEC portion of the 2005 Schedule need not be delayed until three years of post-injury wage data becomes available. In such a case, it might be appropriate to use a shorter period of wage data or to make projections that estimate three years of post-injury earnings.¹⁶ (pp. 22-23)

Footnote 16 reads, “We deem it unnecessary, at this point, to determine how any such projections might be made. If, on remand, the WCJ concludes that earnings estimates must be projected, he may decide this question in the first instance.” (p. 23).

Ogilvie I goes on to provide a numeric formula to calculate DFEC, as follows:

We conclude that if the employee’s individualized rating to loss does *not* fall within any of the range of ratios for any of the eight FEC Ranks, then the employee’s DFEC adjustment factor shall be determined by applying the formula of $([1.81/a] \times .1) + 1$, where “a” is the employee’s individualized rating to loss ratio. This approach is appropriate because it is consistent with section 4660(b)(2)’s requirement that a “numeric formula” be used and because the Schedule used this very same numeric formula for determining its minimum and maximum DFEC adjustment factors. (2005 Schedule, at p. 1-6 [paragraph (a)-4].) (p. 30)

Ogilvie I also provided possible exceptions to using the foregoing method, and noted:

The foregoing method for determining whether the DFEC portion of the 2005 Schedule has been rebutted – and, if so, for determining an individualized DFEC adjustment factor – may be used in most cases. Nevertheless, there may be exceptions where the foregoing method should not be used. (p. 32)

... Therefore, in cases where the injured employee’s actual post-injury earnings are significantly higher than the earnings of his or her control group during the same period, some alternative method may have to be utilized to determine whether the Schedule has been rebutted and, if so, how the employee’s overall permanent disability rating should be calculated. We need not resolve this question now, however.³⁰

Also, there may be instances where it is not proper to use the injured employee’s actual post-injury earnings in determining his or her proportional earnings loss. In establishing their average proportional earnings loss figures, the 2003 and 2004 RAND Studies followed three years of post-injury earnings for 241,685 employees who had sustained industrial injuries over a more than six-year period between January 1, 1991 and April 1, 1997. Given the large number of employees and the broad period of time involved in the RAND Studies, those Studies had no need to consider (and, as a practical matter, probably could not

consider) factors that may have skewed the post-injury earnings of particular employees. Yet, when a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity. As the Supreme Court stated years ago in *Argonaut Ins. Co. v. Industrial Acc. Com. (Montana)* (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130, 133] (*Montana*):

“An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. ...

[A] prediction [of earning capacity for purposes of permanent disability] is . . . complex because the compensation is for loss of earning power over a long span of time. ... In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading. ... [A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant.” (*Montana, supra*, 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133] (internal citations omitted).)

Certainly, an individual employee should not be able to manipulate the proportional earnings loss calculation through malingering or otherwise deliberately minimizing his or her post-injury earnings. Similarly, motivational or other factors may play a role in determining whether a particular employee's post-injury earnings accurately reflect his or her true post-injury earning capacity. Further, an employee may voluntarily retire or partially retire for reasons unrelated to the industrial injury. (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 637-638 [65 Cal.Comp.Cases 139]; *Gonzalez v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 847-848 [63 Cal.Comp.Cases 1477, 1478-1479].) Temporary economic downturns or other factors may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into consideration.

The foregoing examples, however, are merely illustrative of some instances where it might be inappropriate to use the method set out above. These examples are neither all-inclusive nor absolute. The question of whether the DFEC rebuttal method discussed above should or should not be used in any particular case must be determined on a case-by-case basis. Moreover, when the foregoing method is not appropriate, it initially will be up to the assigned WCJ to decide what alternative method might be used. (pp. 33-34)

Footnote 30 reads, “We do observe, though, that conceivable alternatives might be to throw out certain earnings periods for the control group (e.g., if their low earnings are due to some unusual time-limited circumstances) or to use a broader control group.” (p. 33).

It is also significant to know that *Ogilvie I* did not address claims for permanent and total disability (100%) as indicated in footnote 11:

We recognize, however, that there may be some circumstances where an injured employee’s DFEC might be the sole or dominant factor in determining permanent disability, such as where the employee’s injury causes a total loss of earning capacity or something approaching a total loss of earning capacity (see, Lab. Code, § 4662). This question, though, is not before us now. (p. 14)

Ogilvie II

In *Ogilvie II* (2009, September 3), another en banc decision, the WCAB concluded:

In this decision, we hold: (1) the language of section 4660(c), which provides that "the schedule ... shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; and (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's DFEC adjustment factor, which may be accomplished by establishing that an individualized adjustment factor most accurately reflects the injured employee's DFEC. However, any individualized DFEC adjustment factor must be consistent with section 4660(b)(2), the RAND data to which section 4660(b)(2) refers, and the numeric formula adopted by the Administrative Director (AD) in the 2005 Schedule. Any evidence presented to support a proposed individualized DFEC adjustment factor must constitute substantial evidence upon which the Workers' Compensation Appeals Board (WCAB) may rely. Moreover, even if this rebuttal evidence is legally substantial, the WCAB as the trier-of-fact may still determine that the evidence does not overcome the DFEC adjustment factor component of the scheduled permanent disability rating. Otherwise, we affirm our prior decision. (p. 2)

Another important section of *Ogilvie II* states:

Although not expressed, an important principle underlying our February 3, 2009 opinion is that any valid method of challenging the DFEC adjustment factor component of a scheduled permanent disability rating should be consistent with

the constitutional mandate that “the administration of [workers’ compensation] legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.” (Cal. Const., art. XIV, § 4.) This constitutional mandate underlies all of the workers’ compensation provisions of the Labor Code (Lab. Code, § 3201), including section 4660. (p. 23)

Ogilvie II also noted:

Second, even if a party elects to challenge the DFEC component of a scheduled permanent disability rating, nothing in our February 3, 2009 opinion requires that the first three years of post-injury earnings be used. Although we stated that this period “ordinarily” would be used (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 266), we went on to state:

“Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period. This is because the 2003 and 2004 RAND Studies used three-year proportional earnings losses only ‘because these data provide the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct [an] analysis’ for a large-scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate.” (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 266.)

Third, we recognize that, by definition, when an employee is receiving temporary disability indemnity he or she is unable to work or is unable to work for full wages. Indeed, “[t]he primary element of temporary disability is wage loss.” (*Granado v. Workers’ Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 403 [33 Cal.Comp.Cases 647, 650]; see also *Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044, 1052-1053].) Accordingly, where an injured employee has been off work (or partially off work) and receiving temporary disability indemnity for a period of two years, it may be difficult to assess the employee’s actual earning capacity for a three-year period. In such a circumstance, however, the scheduled DFEC adjustment factor may be used to initially rate the employee’s permanent disability. Then, if within five years of the date of injury it later becomes clear that the employee’s individualized proportional earnings loss is significantly higher or lower than anticipated, a party may seek to reopen the issue of permanent disability by challenging the originally used DFEC adjustment factor. (Lab. Code, §§ 5410, 5803, 5804; see *LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (original 60%

permanent disability rating reopened and increased to 100% after it was later determined that the injured employee could not be vocationally retrained for suitable gainful employment) (*LeBoeuf*). (pp. 31-32)

Two panel decisions (involving 3 of the 7 commissioners) followed *Ogilvie II*. The first was *Shini* (2010), which reiterated the importance of applying the *Montana* (1962) factors, as described in *Ogilvie I* above, in the calculation of DFEC (p. 7).

Shini

The commissioners concluded in *Shini* (2010), as follows:

In this case, the WCJ did not give the reasoning behind any weighing of the scheduled rating and the adjusted rating. In fact, the WCJ does not even state in his Opinion on Decision or Report what the schedule DFEC adjustment is for either of the injuries. In the further proceedings, the WCJ must do a complete *Ogilvie* analysis explaining, among other things, the evidence which was relied upon to find the applicant's earning loss and explaining the earning loss period decided upon. The WCJ should discuss whether this adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of whether the applicant was malingering, and a discussion of the *Montana* factors enumerated above. Finally, the adjusted DFEC factor must be weighed against the scheduled factor to determine which better reflects the applicant's diminished earning capacity. We emphasize again that the party challenging the scheduled rating, in this case the applicant, has the burden of proof on the issue. The WCJ may develop the record at his discretion on these or any other issues before rendering a decision complying with Labor Code § 5313 and our decision in *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp. Cases 473, 476 (Appeals Bd. en banc). (pp. 9-10)

Noriega Garcia

In *Noriega Garcia* (2010), another panel decision, the commissioners again concluded that it is most important to consider the *Montana* (1962) factors in calculating DFEC. The commissioners concluded:

We believe that an analysis regarding the above factors was mandated in this case. Although there was evidence that applicant could not return to her previous employment, there was no evidence presented that the applicant could not work at all. Although we do not wish to minimize the severity of the applicant's injuries, and we make no findings on the issue, the qualified medical evaluator found the applicant to suffer from only slight to occasionally moderate pain. Given that applicant claimed almost no earnings, and her individualized DFEC adjustment was so divergent from the scheduled adjustment factor, an analysis of the above factors is required in this case. Given this set of facts, we believe that the WCJ's

analysis was incomplete regarding the proper alternative DFEC adjustment and whether any alternative DFEC adjustment is better reflection of the applicant's earning capacity than the scheduled adjustment. (pp. 6-7)

The commissioners continued by stating:

In this case, the WCJ did not give the reasoning behind any weighing of the scheduled rating and the adjusted rating. In fact, the WCJ does not even state in his Opinion on Decision or Report what the scheduled DFEC adjustment is for either of the injuries. In the further proceedings, the WCJ must do a complete *Ogilvie* analysis explaining, among other things, the evidence which was relied upon to find the applicant's earning loss and explaining the earning loss period decided upon. The WCJ should discuss whether this adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of the *Montana* factors enumerated above. Finally, the adjusted DFEC factor must be weighed against the scheduled factor to determine which better reflects the applicant's diminished earning capacity. We emphasize again that the party challenging the scheduled rating, in this case the applicant, has the burden of proof on the issue. The WCJ may develop the record at his discretion on these or any other issues before rendering a decision complying with Labor Code § 5313 and our decision in *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc). (p. 7)

Montana

In *Montana* (1962), the California Supreme Court ruled:

The more difficult question is whether the commission correctly determined Montana's earning capacity under subdivision (d) of section 4453 of the Labor Code^[1] in computing *594 temporary and permanent disability compensation. Other subdivisions of that section (Lab. Code, § 4453, subd. (a), (b), (c)) set forth formulae for computing average weekly earnings that in turn are made the basis for the two types of award. (Lab. Code, §§ 4653-4655; 4658-4662.) [3] When an employee is steadily employed at a full-time job his earning capacity is determined by an appropriate formula (see *West v. Industrial Acc. Com.*, 79 Cal. App.2d 711, 722 [180 P.2d 972]). When the employment is for less than 30 hours a week or when a formula "cannot reasonably and fairly be applied" the commission must make its own estimate of weekly earning capacity at the time of the injury. (Lab. Code, § 4453, subd. (d).) The purpose of this provision is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of injury may be aberrant or otherwise a distorted basis for estimating true earning power. [4] It would hardly be consistent with that purpose to foreclose a worker from a maximum temporary or permanent award simply because a brief recession had forced him to work

sporadically or at a low wage. Nor in making a permanent disability award would it be consistent with the purpose of the statute to base a finding of maximum earning capacity solely on a high wage, ignoring irregular employment and low income over a long period of time.

[5] An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum *595 for a permanent award or the reverse. [6] Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability, the commission will ordinarily be concerned with whether an applicant would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. [7] With regard to both awards all facts relevant and helpful to making the estimate must be considered. (*Colonial Mut. Comp. Ins. Co. v. Industrial Acc. Com.*, 47 Cal. App.2d 487, 490-492 [118 P.2d 361]; *Aetna Life Ins. Co. v. Industrial Acc. Com.*, 130 Cal. App. 488, 491-492 [20 P.2d 372]; see *Southern Bell Tel. & Tel. Co. v. Bell* (Fla.) 116 So.2d 617, 620-621; *Vanney v. Alaska Packers Assn.*, 12 Alaska 284, 290-291; Larson, *The Law of Workmen's Compensation*, § 57.21 at pp. 4-7.) The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant. (See *West v. Industrial Acc. Com.*, *supra* at p. 722; *Aetna Life Ins. Co. v. Industrial Acc. Com.*, *supra* at pp. 491-492.) In weighing such facts, the commission may make use of "its general knowledge as a basis of reasonable forecast." (*Latour v. Producers Dairy, Inc.*, 102 N.H. 5 [148 A.2d 655, 657]; compare *Russell v. Southeastern Util. Service Co.*, 230 Miss. 272 [92 So.2d 544, 547].) [8] In weighing the evidence relevant to earning capacity the commission has the same range of discretion that it has in apportioning injuries between **industrial** and nonindustrial causes. (See e.g., *Aetna Life Ins. Co. v. Industrial Acc. Com.*, *supra* at p. 493.) It must, however, "have evidence that will at least demonstrate the reasonableness of the determination made." (*Davis v. Industrial Com. of Arizona*, 82 Ariz. 173 [309 P.2d 793, 795].) (pp.2-3)

Ogilvie III

In *Ogilvie v. WCAB* and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III*, the California Court of Appeal ruled that:

Labor Code section 4660, subdivision (c)¹ provides that the California Permanent Disability Rating Schedule (rating schedule) is "prima facie evidence" of the percentage of permanent disability to be attributed to an employee's work-related injury in a workers' compensation case. The core issue presented here is: What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating? Because we cannot conclude on this record whether Ogilvie effectively rebutted application of the rating schedule, we reverse the decision of the Workers' Compensation Appeals Board (WCAB), annul the award of benefits to Ogilvie, and remand for further proceedings consistent with our opinion. (p. 1-2)

Ogilvie III provides 3 methods for rebutting the schedule, as follows:

Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (p. 14)

Regarding the method for showing a factual error in the calculation of a factor in the rating formula or application of the formula, *Ogilvie III* states:

The possibility an employee can demonstrate such an error in the earning capacity adjustment factor is more than theoretical, particularly in cases like this one involving a back injury. The RAND Institute for Civil Justice released a working paper in 2004 that describes the methodology employed to arrive at empirical adjustments to disability ratings due to diminished future earning capacity. (RAND Institute for Civil Justice, Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 (2004) (Working Paper).) The working paper places several caveats on the use of the empirical data relied upon by the RAND Institute in reaching the earning capacity adjustments. For example, one of the challenges faced by the RAND group was that the data previously assembled to consider earnings loss attributable to certain injuries was categorized by descriptions used by the California Permanent Disability Rating System, while Senate Bill No. 899 requires injury descriptions based on the American Medical Association Guides. (Working Paper at p. 7.) The descriptions are quite different in practice, and at the time the future earning capacity adjustments were established, there was no direct link between the data used by RAND and the American Medical Association Guides. (*Ibid.*) An ideal system would combine information on earnings losses with actual American

Medical Association Guide ratings. (*Id.* at p. 14.) The working paper also makes certain assumptions that are critical when the diminished earning capacity ratings are applied to back injuries. (*Id.* at pp. 10-12.) If any of the assumptions are incorrect, the estimated ratings could be biased. (*Ibid.*) A challenge to the ratings schedule on the basis that there was a factual error in the calculation of one of its component factors, or it was incorrectly applied in a particular case does not undermine the schedule's "consistency, uniformity, and objectivity." (§ 4660, subd. (d).) It merely serves to correct it or ensure its accurate application. (pp.10-11)

Regarding the second rebuttal method concerning "the omission of medical complications aggravating the employee's disability in preparation of the rating schedule (p. 14), *Ogilvie III* states:

The briefs and arguments of the parties and amici also point out a third basis for rebuttal of a scheduled rating that is consistent with the statutory scheme. In certain rare cases, it appears the amalgamation of data used to arrive at a diminished future earning capacity adjustment may not capture the severity or all of the medical complications of an employee's work-related injury. After all, the adjustment is a calculation based upon a summary of data that projects earning losses based upon wage information obtained from the California Employment Development Department for a finite period and comparing the earnings losses of certain disabled workers to the actual earnings of a control group of uninjured workers. (Working Paper at p. 3.) A scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor. For example, a claimant who sustains a compensable foot fracture with complications resulting from nerve damage may have greater permanent effects of the injury and thereby disprove the scheduled rating if the sampling used to arrive at the rating did not include any workers with similar complications. In such cases, the scheduled rating should be recalculated taking into account the extent to which the claimant's disability has been aggravated by complications not considered within the sampling used to compute the adjustment factor. In this way, the employee's permanent disability rating gives "consideration" to an employee's diminished earning capacity that remains based upon "a numeric formula based upon empirical data and findings . . . prepared by the RAND Institute." (§ 4660, subds. (a) & (b)(2).) We leave it to the WCAB in the first instance to prescribe the exact method for such a recalculation that factors the employee's anticipated diminished earning capacity into the data used by the RAND Institute. (See § 300.) (pp. 12-13)

Regarding the third rebuttal method, "by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating" (p. 14), *Ogilvie III* notes:

Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Ca1.3d 234. . (p. 11)

Ogilvie III states further regarding this rebuttal method concerning not being amenable to rehabilitation:

This application of *LeBoeuf* hews most closely to an employer's responsibility under sections 3208 and 3600 to "compensate *only* for such disability or need for treatment as is occupationally related." (*Livitsanos v. Superior Court, supra*, 2 Ca1.4th at p. 753.) "Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors." (*Brodie v. Workers' Comp. Appeals Bd., supra*, 40 Ca1.4th at p. 1321 [discussing apportionment].) An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than reflected in a rating because, due to the industrial injury, the employee is not amenable to rehabilitation. (p. 12)

Ogilvie III also states clearly that certain non-industrial vocational factors are impermissible in developing an opinion regarding diminished future earning capacity by noting:

. . . While some of the briefing provided to the court may be read to suggest that under *LeBoeuf* a disability award may be affected when an employee is not amenable to vocational rehabilitation for any reason, the most widely accepted view of its holding, and that which appears to be most frequently applied by the WCAB, is to limit its application to cases where the employee's diminished future earnings are directly attributable to the employee's work related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education. . . (p. 11)

The California Court of Appeal concluded in *Ogilvie III*:

The application of the rating schedule is not rebutted by evidence that an employee's loss of future earnings is greater than the earning capacity adjustment that would apply to his or her scheduled rating due to nonindustrial factors. Rather, to rebut the application of the rating schedule on the basis that the scheduled earning capacity adjustment is incorrect, the employee must demonstrate an error in the earning capacity formula, the data or the result derived from the data in formulating the earning capacity adjustment. Alternatively, an

employee may rebut a scheduled rating by showing that the rating was incorrectly applied or the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury. We cannot conclude on this record whether Ogilvie can make any such showing. (p. 15)

LeBoeuf

In *LeBoeuf* (1983), the California Supreme Court ruled:

Similarly, the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating. Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating. (p. 594)

In addition, the California Supreme Court concluded in *LeBoeuf* (1983), that:

A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability. A prior permanent disability rating and award which fails to reflect that fact is inequitable. (p. 597)

Assembly Bill 1168

California Assembly Bill 1168 (AB 1168) was signed into law by Governor Jerry Brown on October 5, 2011. AB 1168 added Section 5307.7 to the California Labor Code. Section 5307.7 (Bae, 2012) states:

(a) On or before January 1, 2013, the administrative director shall adopt, after public hearings, a fee schedule that shall establish reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony determined to be reasonable, actual, and necessary by the appeals board.

(b) A vocational expert shall not be paid, and the appeals board shall not allow, vocational expert fees in excess of those that are reasonable, actual, and necessary. **Leg.H.** 2011 ch. 555 (AB 1168) §1. (p. 386)

Summary

In summary, this article has provided excerpts of the actual law, regulations, and court decisions pertaining to a determination of diminished future earning capacity in California workers' compensation cases. Significant regulations and court decisions following Senate Bill 899 were provided regarding the determination and calculation of diminished future earning capacity. Excerpts from *Montana* (1962), *LeBoeuf* (1983), *Ogilvie I* (2009, February 3), *Ogilvie II* (2009, September 3), *Shini* (2010), *Noriega Garcia* (2010), and *Ogilvie III* (2011) were provided.

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- LeBoeuf v. WCAB*, 34 C3d 234, 193 CR 549, 48 CCC 587 (1983).
- Noriega Garcia v. Patrick L. Henrichsen*, Opinion and Order Granting Reconsideration and Decision after Reconsideration, WCAB No. ADJ6721939 (2010).
- Ogilvie v. City and County of San Francisco*, Opinion and Decision after Reconsideration, En Banc, WCAB No. ADJ1177048 (SFO 0487779), 74 CCC 248 (2009, February 3).
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- Shini v. Pacific Coast Auto Body & Truck*, Opinion and Order Granting Reconsideration and Decision after Reconsideration, WCAB No. ADJ2079252 (SDO 0339791) (2010).

Labor Code – Selected Provisions

4659. (a) If the permanent disability is at least 70 percent, but less than 100 percent, 1.5 percent of the average weekly earnings for each 1 percent of disability in excess of 60 percent is to be paid during the remainder of life, after payment for the maximum number of weeks specified in Section 4658 has been made. For the purposes of this subdivision only, average weekly earnings shall be taken at not more than one hundred seven dollars and sixty-nine cents (\$107.69). For injuries occurring on or after July 1, 1994, average weekly wages shall not be taken at more than one hundred fifty-seven dollars and sixty-nine cents (\$157.69). For injuries occurring on or after July 1, 1995, average weekly wages shall not be taken at more than two hundred seven dollars and sixty-nine cents (\$207.69). For injuries occurring on or after July 1, 1996, average weekly wages shall not be taken at more than two hundred fifty-seven dollars and sixty-nine cents (\$257.69). For injuries occurring on or after January 1, 2006, average weekly wages shall not be taken at more than five hundred fifteen dollars and thirty-eight cents (\$515.38).

(b) If the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life.

(c) For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred.

4660. (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

(b) (1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in

evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.

(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision.

4661. Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability.

Every computation made pursuant to this section shall be made only with reference to disability resulting from an original injury sustained after this section as amended during the 1949 Regular Session of the Legislature becomes effective; provided, however, that all rights presently existing under this section shall be continued in force.

4661.5. Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computing the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453.

4662. Any of the following permanent disabilities shall be conclusively presumed to be total in character:

- (a) Loss of both eyes or the sight thereof.
- (b) Loss of both hands or the use thereof.
- (c) An injury resulting in a practically total paralysis.
- (d) An injury to the brain resulting in incurable mental incapacity or insanity.

In all other cases, permanent total disability shall be determined in accordance with the fact.

4663. (a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

(e) Subdivisions (a), (b), and (c) shall not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

4664. (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.



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August 22, 2011

Peter Q. Simmons, Esq.
Global Insurance Company, Legal Department
P.O. Box 44236
Hercules, CA 94500

Re: Cameron S. Streeter
Employer: Rugged Iron Company, Inc.
WCAB #: ADJ 4421099978
Claim #: 858-09345-0948
DOI: 04/15/2005; CT – 11/26/05
Mirfak #: STRECA-WD

DIMINISHED FUTURE EARNING CAPACITY EVALUATION

Overview

I completed a diminished future earning capacity evaluation of Cameron S. Streeter, at the request of defense attorney, Peter Simmons. The purpose of the evaluation was to develop opinions regarding Mr. Streeter's employability and earning capacity in relation to his injury of 4/15/05; CT – 11/26/05 and related matters in preparation for trial testimony regarding his application for permanent disability at the Workers' Compensation Appeals Board. The overall purpose of the evaluation is to assess an individual's ability to both obtain and maintain employment as well as the impact of the work injury on the individual's earning capacity.

This report outlines my findings and opinions based on information available at this time. Should additional information become available in the future, my opinions may be modified.

Scope of Evaluation

As a part of this evaluation, I was asked to conduct a complete and thorough vocational evaluation to assess Mr. Streeter's employability and earning capacity in relation to a potential claim for 100% disability under Labor Code section 4662 or *LeBoeuf*.

Methodology

I reviewed the medical, vocational and related records that were provided by Mr. Simmons. I reviewed additional wage records that were provided directly by Mr. Streeter. All of the records are outlined in the Record Review of

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7/13/11. I interviewed and tested Mr. Streeter on 7/12/11 at my office in Walnut Creek, California. Thereafter, I analyzed his test scores, transferable skills, and the local labor market to determine his employment potential and earning capacity.

The *LeBoeuf Evaluation Process* (Van de Bittner, 2003), a peer-reviewed and published vocational rehabilitation evaluation methodology, was followed for this assessment of Mr. Streeter's employability. I also completed an analysis of Mr. Streeter's employability and earning capacity in relation to Labor Code section 4662. The *McCroskey Transferable Skills Program* by Billy J. McCroskey, Ph.D., was used to assess Mr. Streeter's transferable skills. The *RAPEL Method* by Roger O. Weed, Ph.D., was used to evaluate and develop rehabilitation plan options for Mr. Streeter. The *WCEC Formula* by Eugene E. Van de Bittner, Ph.D. was used to determine Mr. Streeter's diminished future earning capacity in relation to the 7/29/11 *Ogilvie* decision. All four methodologies are peer-reviewed and published.

Carol Asch, M.S., CRC, Rehabilitation Consultant, assisted me with the skills analysis and labor market research. I consulted a wide range of materials throughout the course of my evaluation. They are listed in the reference section of this report.

This was a complex medical-legal diminished future earning capacity evaluation for permanent disability rating purposes. The evaluation considered medical and vocational factors affecting employability and earning capacity. The record review required 6.8 hours. This was followed by an interview lasting 2.4 hours and vocational testing of 3.3 hours. A systematic transferable skills analysis was completed and required 2.0 hours. An employability analysis was conducted and required 3.0 hours. Labor market and school research was completed and required an additional 15.0 hours. An earning capacity analysis was completed and required 2.5 hours. Finally, a detailed report of the findings and opinions regarding Mr. Streeter's employability and earning capacity was prepared requiring 5.0 hours.

Interview with Mr. Streeter

On 7/12/11, Mr. Streeter reported promptly to the office for his scheduled appointment. He drove from his home in Manteca to the office in Walnut Creek, California by himself. The trip took about 2 hours because of heavy traffic.

I explained the purpose of the diminished future earning capacity evaluation, that I was asked to evaluate his vocational feasibility, employability, and earning capacity, and that I had not been asked to function as his vocational rehabilitation counselor. I further informed him of the limits of confidentiality and that I would prepare a written report including, among other things, the information obtained from him. He was provided oral and written disclosure information.

Personal/Social

Mr. Streeter is a 50-year-old, married, foreman/journeyman iron worker with a disability who lives in Manteca, California with his wife and their 19-year-old son. An older son, age 24, lives

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elsewhere.

Mr. Streeter is 6'1" tall and weighs about 310 lbs. He weighed about 270-280 lbs. when he last worked on 11/26/05. He attributed his weight gain to inactivity related to his disability.

Mr. Streeter is right-hand dominant. He wears prescription eyeglasses for driving at night. English is his primary language and he noted that he also speaks broken Spanish.

Mr. Streeter was neatly dressed and well-groomed when he reported to the office for his scheduled appointment. He was pleasant and cooperative throughout the interview. Rapport was established, and he displayed a positive attitude toward the evaluation process. But, he expressed some significant concerns regarding his disability and the impact that it has had on his ability to function personally and vocationally.

Mr. Streeter was born in Oakland, California. In 1963, he moved with his family to Newark, California. In 1981 or 1982, he moved to Fremont and lived there for about 2 years. Next, he lived in Hayward until 1986, when he relocated to Manteca, California, which is where he has lived ever since. He and his wife are purchasing their home in Manteca, which is where they have lived for the past 11 years. This is where Mr. Streeter was living at the time of injury. He has no immediate plans to relocate.

Mr. Streeter has a California driver's license with no restrictions. However, as noted above, he usually will wear eyeglasses while driving at night. There are no moving violations in his driving record. He has reliable transportation and estimated a reasonable commute as being less than 5 minutes from home. He did not know if his home is accessible by public transportation.

Mr. Streeter reported that he has not been convicted of any felonies. He has no problems with recreational drugs or alcohol.

Financial

At the time of injury, Mr. Streeter reported that he was paid union scale wages for iron workers, which changes yearly and according to the job. At the time of injury, the hourly wage was \$31.00-\$32.00. He explained that his hours varied for his job at SOTO, about 15-30 hours per week. His earnings included the usual union benefits in addition to wages. He was a member of the Iron Workers Union Local 444 in San Francisco, California. Earlier in his career, he was a member of Local 324 in Oakland, California.

Current sources of income include workers' compensation benefits of \$440.00 every 2 weeks, SSDI benefits of about \$1,840.00 per month, and a union pension of \$2,400.00 per month, which is reduced to \$1,550.00 per month after a deduction for health insurance for himself and his son. Mr. Streeter reported that he has no income from wages at this time.

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Payroll records from IRON Works. (Rugged Iron Company, Inc.) indicate that Mr. Streeter's gross wages from 1/6/05 to 11/30/05 were \$37,083.79. His gross earnings from 9/2/04 to 12/30/04 were \$26,737.41.

W-2 Wage and Tax Statements for Cameron S. Streeter provide the following earnings information:

<u>Year</u>	<u>Employer</u>	<u>Wages</u>
2004	Iron Works Rugged Iron Company, Inc.	\$29,308.81
2004	Steel Erection, Inc.	4,056.72
2004	Peterson Iron, Inc.	9,317.32
2004	Smith Corp.	7,751.18
2004	Too Big Crane Company.	1,022.90
Total		\$51,456.93
2005	Iron Works Rugged Iron Company, Inc.	\$40,564.35
	Scraper Iron, Inc.	5,114.40
Total		\$45,678.75

Mr. Streeter's annual earnings from his 6/27/02 Social Security Statement are as follows:

<u>Year</u>	<u>Earnings</u>
1977	\$ 881
1978	3,508
1979	6,638
1980	25,850
1981	19,879
1982	21,964
1983	15,986
1984	27,889
1985	38,329
1986	30,479
1987	41,903
1988	43,594
1989	42,741
1990	27,288
1991	32,414

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1992	31,177
1993	33,990
1994	46,497
1995	42,155
1996	45,727
1997	48,478
1998	55,922
1999	42,419
2000	49,004
2001	57,098

Medical

Mr. Streeter sustained a cumulative trauma injury at work culminating on 11/26/05. Multiple body parts were affected, including both knees, neck, back, shoulders, ankles, sleep, metabolic, psyche, sexual dysfunction, xerostomia, eyes, lungs, hands, wrists, bruxism, hearing, hips, and elbows. Mr. Streeter underwent a right inguinal hernia repair in 1/84. He had right knee surgery on 11/25/92, 1/3/06, and 1/19/09. He underwent left knee surgery on 1/18/95. He underwent a left carpal tunnel repair on 8/6/98 and a right carpal tunnel repair on 5/13/99.

His current treating physician is _____ French, M.D., his knee surgeon, whom he sees as needed. His last appointment was in 6/11 at which time he received a cortisone injection in his left knee. Mr. Streeter also mentioned that he had been receiving acupuncture and that his last visit was about 2 months prior to his appointment with me.

Mr. Streeter reported that he takes no prescription medication for his knee condition, but that he does take ibuprofen, 800 mg for pain, 4 tablets a day, 2-3 days a week. He had not taken any prior to his appointment since he thought this was not permitted. When I told him that he should follow his usual practice during his day at the office, he took 4 ibuprofen tablets during the break between the interview and testing session. He also reported that he takes a multivitamin.

In addition, Mr. Streeter sees _____ Turner, M.D. for high blood pressure. Dr. Turner prescribes Cozaar, which he uses once a day. He is unaware of any side effects.

On 7/13/11, I called Mr. Streeter to ask him if he still uses marijuana for pain control. He said that he still uses it about 2 times a week and that it primarily helps him relax.

Information regarding Mr. Streeter's functional limitations, work restrictions, psychiatric impairments, and whole person impairments can be found in the Employability Analysis section of the report. Additional information regarding Mr. Streeter's medical condition can be found in the attached Record Review.

Response to Injury

Outward signs of disability. Mr. Streeter changed positions from sitting to standing during the interview and the later testing session. He removed his shoes during part of the interview. He walked with a slight limp. He asked that I remove a gardenia blossom from my desk since he was sensitive to the fragrance.

Assistive devices or equipment. Mr. Streeter explained that he wraps his knees in an Ace bandage during the wintertime, during cold weather. He has a cane but does not use it very much. He does not have a prescription, but a physician told him he can use one if it is helpful. He used a cane after his knee surgeries.

Assistance with ADLs and home care. Mr. Streeter is independent in personal activities of daily living such as bathing, grooming, dressing, toileting, and feeding himself. But, these activities take longer than prior to his injury. He also noted at that time that he has a raised toilet at home. He is able to cook while alternating between standing and sitting. He has a stool in the kitchen. He is able to do light cleaning and laundry. His wife does the heavier house cleaning. His son does the yard work. Mr. Streeter is unable to wash his car, except to dry it after taking it through a carwash. He handles the mail and bills.

Visible scars. Mr. Streeter has puncture wounds from his arthroscopic knee surgeries and a scar at his right knee from his total knee replacement. He has faint scars at both hands from his prior carpal tunnel releases. He has artistic tattoos on both forearms.

Described pain. Mr. Streeter described frequent low back pain at level 7-9 on a scale of 1-10 with 10 being excruciating pain. He reported constant left knee pain at level 7-8.5 and constant right knee pain at level 6-8. The pain is more pronounced while walking. He reported pain in both ankles at level 7 and pain in both hips at level 5-6. He reported constant right shoulder pain at level 8-9 and constant left shoulder pain at level 6-7. He has occasional pain in his elbows and constant pain in his wrists. He also reported that he had experienced pain in his neck for about 2 months prior to his appointment. He gets headaches if he forgets to eat. He also reported that he gets headaches if he does not talk.

General health. Mr. Streeter has headaches as described above. He reported dizziness if he does not eat. He has neck and back pain as described above. He reported that he has no chest pain. Regarding stomach and digestive problems, he noted that prescription medication in the past caused stomach upset. He reported that he has no problems with urination or elimination.

A typical day. Mr. Streeter arises between 5:30 and 6:00 a.m. and retires between 10:00 and 11:00 p.m. He has difficulty falling asleep because he cannot get comfortable. He wakes up about 2 times each night to use the bathroom and because of discomfort. He is awake for anywhere from 20 minutes to 2 hours before getting back to sleep. In the morning, he gets up, stretches, and eats breakfast. He goes to the gym and then will return home and rest. He does artwork at home with various colors of duct tape, cutting it with an exacto knife and applying it to dressers, tables, and other objects. This may involve painting and etching. To protect

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surfaces, he will apply a plastic seal or a glass cover. He later showed me a cell phone video of a dresser that he had completed in this medium, a type of decopauge and painting. He also showed me a still picture of an etching of Half Dome in Yosemite Valley on the surface of a dresser drawer. Mr. Streeter explained that he usually spends some time everyday on his artwork. He likes to stay active. He also may go to the park since he also enjoys being outdoors.

Techniques to relieve the effects of his condition. These include medication and occasional doctor visits. He uses marijuana for relaxation and pain control. He has modified some activities of daily living.

Readiness to return to work. Mr. Streeter was clear that he would not be able to work again as an iron worker. When asked about working within his medical restrictions, he noted that he is concerned about the reaction of employers and co-workers to his need to change positions from sitting to standing. He also said that he was not sure he would be able to work if work were available within his medical restrictions.

Described physical capacities. Mr. Streeter reported that he is able to sit comfortably in an office chair for about 10 minutes. He is able to stand in a fixed position for 5 minutes or less. He is able to walk comfortably for less than 1 block.

He is able to lift and carry groceries, including a 24-pack of water.

Pushing and pulling are limited and painful. He is able to climb stairs one step at a time while using a handrail. He does not climb ladders. He avoids inclines. His balance is somewhat unsteady. He needs to be cautious while walking.

He had not had any difficulty bending or twisting at the neck until about 2 months prior to his appointment. Bending and twisting at the waist are limited and painful. He avoids stooping, kneeling, crouching, and crawling.

He is able to reach ahead and above shoulder level with his left arm although it is painful while doing so with his right arm.

He reported no problems with simple grasping or with gripping, except that his hands are stiff when he wakes up in the morning.

He reported no problems with fingering, feeling, or writing. He can use his thumbs for texting so long as he lets his thumbnails grow a little longer.

He reported no difficulty with talking. But, hearing is limited and he has ringing in his ears. He understands that this is most likely from working in a noisy environment for his job, but he explained that he always wore earplugs at work.

He reported no change in his sense of taste or his sense of smell. He is able to see close up and far away, except that he usually wears eyeglasses for driving at night. He is unaware of any

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problems with his color vision.

When asked about breathing, he noted that he has allergies.

Driving is limited, as noted above. His eye/hand/foot coordination has been impacted by his work injury.

Environmental factors. Mr. Streeter has no difficulty in general being indoors or outdoors although he prefers to be outdoors. Extreme cold leads to an increase in joint pain. He is not sure if wetness and humidity impact his condition. But, extreme heat is uncomfortable.

Loud noise is also uncomfortable. Vibration can be painful, such as riding over a rough road.

He is overly sensitive to some fumes and odors, such as being in a room when his wife is using hairspray. He is also sensitive to certain plastics.

He avoids hazards and unprotected heights.

Psychological factors. Mr. Streeter feels that his attention, concentration, and memory have been impacted by his work injury. He is not sure if there has been a change in his reasoning ability. Emotionally, he feels irritable at times. His motivation is somewhat lessened.

Hobbies and recreational activities. Prior to his work injury, he spent more time at the gym. He enjoyed taking his sons to the park. At the present time, he still goes to the gym but will limit his activities, such as to use the machines. He does not do any heavy weightlifting any longer. His duct tape artwork hobby was described above. He has done this for the past 3 years. He has not shown his work. He does not want to give it up.

Social activities and volunteer work. Social activities are primarily related to his family. He does not do any volunteer work at this time. He has not helped his wife in her classroom as a schoolteacher for about a year. He noted that she changed from kindergarten to 1st grade the past school year.

School and Training History

In 1978, Mr. Streeter graduated from Mountain High School in Palo Alto, California.

He attended a college in Hayward, California, but left during the first semester. He lost interest in his studies. He wanted to play football, but disliked the coach.

Military Service

Mr. Streeter has not served in the military.

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Work History

Just after high school, for about a year or 2, Mr. Streeter worked as an electronics assembler for Smart Semiconductors in Mountain View and Technical Material Co.. His duties included building computer frames and cabinets.

From 1980 until 11/26/05, he worked as a union iron worker, first through Local 324 in Oakland and later through Local 444 in San Francisco, when he relocated to Manteca, California. He had a variety of duties, including decking, rigging, welding, forklift driving, and some supervision. He worked in high rise construction as well as in plants to replace machinery, work that he was doing at the time of injury for Rugged Iron Company, Inc. in Castro Valley, California. He was assigned to the SOTO plant in Fremont, California where he and his crew were involved in replacing robots and machinery on automobile assembly lines for new model assembly. He worked for Rugged Iron Company, Inc. from around 2003 until 11/25 or 11/26/05. In addition to his regular duties, he also was the foreman of the scrap yard where he was in charge of 4-5 workers.

According to the 6/16/09 Description of Employees Job Duties (RU-91), Mr. Streeter worked as a Foreman-Journeyman for Rugged Iron Company, Inc.. He worked an average of 8.6 hours per day and 34 hours per week. His job responsibilities were described as follows:

Foreman – Print reading, layout job, assigned men to jobs.

Journeyman – Forklift opp., torch cutting, mech assemble connecting.

The employer comment section of the RU-91 states, “Mr. Streeter’s primary job duty was to operate various size forklifts. At other times he was assigned as Foreman.”

Mr. Streeter explained that he left work on 11/25 or 11/26/05 because of his work injury. He reported that he has not worked for any employer in any capacity since that time.

Described employment skills. Perceived skills from jobs in Mr. Streeter’s work history include those related to iron work, specifically decking, rigging, high rise construction, and plant remodeling. He did some welding. He worked on only one bridge project.

In terms of business practices, Mr. Streeter has had no experience with bookkeeping, inventory control, shipping, receiving, scheduling, or instructing. But, he has had experience in supervising workers.

In terms of machines or equipment, he has had no experience with computers or typewriters. He has not operated farm equipment or construction equipment. In terms of transportation equipment, he has operated forklifts and scissors lifts. Regarding hand and power tools, he has used deck guns and impact guns. He has had no experience with machine or shop tools, however.

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Licenses, certificates, tools or equipment. Mr. Streeter does not have any special licenses or certificates that could be used for work at this time. He does not possess any special tools or equipment that could be used for work.

Vocational Rehabilitation Efforts

Mr. Streeter has not participated in any formal vocational rehabilitation activities. In discussing this matter, he indicated a possible interest in meeting with a rehabilitation counselor. Therefore, I provided him contact information for the California Department of Rehabilitation office in Modesto, California. I also provided him contact information for the Employment Development Department's One-Stop Career Center in Modesto, California.

Vocational Future

When asked what he would most like to do for work at this time, Mr. Streeter explained that he is not certain. He does not have any specific plans in place for returning to work. I later asked him if he had considered drafting or design, given his combination of work history as an iron worker and his interest and apparent talent for artwork. He indicated that he had not. I explained to him how he could discuss this and other occupations with a rehabilitation counselor at the California Department of Rehabilitation, if he were interested in pursuing them.

Self-initiated Return to Work Activities

Mr. Streeter has not sought work since he last worked for Rugged Iron Company, Inc. on 11/25 or 11/26/05. He explained that he had not sought work with other employers since he is concerned about who would hire him with his limitations.

Vocational Testing

On July 12, 2011, Mr. Streeter was administered the following standardized tests:

Dvorine Color Vision Test
Wide Range Achievement Test
Wechsler Abbreviated Scale of Intelligence
Purdue Pegboard
Bennett Hand-Tool Dexterity Test
Minnesota Clerical Test
Bennett Mechanical Comprehension Test
Gates-MacGinitie Reading Tests

The *Dvorine Color Vision Test* is a screening test of red/green colorblindness. Mr. Streeter scored as follows:

<u>Raw Score</u>	<u>Result</u>
------------------	---------------

14 Normal color vision

Mr. Streeter identified all 14 of the 14 color plates without difficulty. His score places him in the normal range. His score suggests that he has the necessary color vision for jobs and training programs that would typically be considered for vocational rehabilitation purposes that require this worker trait.

The *Wide Range Achievement Test* provides a measure of academic achievement for spelling (written words to dictation) and math computation (written computations). When compared with adult workers, Mr. Streeter scored as follows:

<u>Subtest</u>	<u>Raw Score</u>	<u>Percentile</u>	<u>Grade</u>
Spelling	34	9	6.4
Math Computation	39	30	8.8

Mr. Streeter scored at the 6th grade level for spelling and at the 8th grade level for math computation. His scores are low for spelling and low average for math computation when compared with those of adult workers. Overall, his scores indicate that he has the necessary spelling and math skills for many jobs that would be considered for vocational rehabilitation purposes and that he would need to improve his academic skills for higher level occupations.

The *Wechsler Abbreviated Scale of Intelligence* provides a reliable estimate of intellectual functioning. When compared with other adults in his age group in the general population, Mr. Streeter scored as follows:

<u>Subtest</u>	<u>Raw Score</u>	<u>T Score</u>	<u>Percentile</u>
Vocabulary	51	42	22
Block Design	33	48	44
Similarities	23	34	6
Matrix Reasoning	19	47	39
<u>Scale</u>	<u>T Score Sum</u>	<u>IQ</u>	<u>Percentile</u>
Verbal	76	82	12
Performance	95	96	39
Full Scale	171	87	19

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Mr. Streeter scored low for verbal intellectual functioning and low average for non-verbal intellectual functioning. He earned an estimated Full Scale score of 87, which is low average score. Overall, his scores indicate that he has the necessary intellectual functioning for many jobs and training programs that would typically be considered for vocational rehabilitation purposes and that it would be wise for him to emphasize his non-verbal strengths.

The *Purdue Pegboard* is a test of dexterity designed to aid in the selection of employees for industrial jobs such as assembly, packing, operation of certain machines, and other manual jobs. It measures dexterity of the hands, fingers, arms, and fingertip dexterity. Mr. Streeter scored as follows:

<u>Subtest</u>	<u>Raw Score</u>	<u>Percentile</u>	<u>Norm Group</u>
Right Hand	14	27	Industrial applicants
Right Hand	14	16	Adult workers
Left Hand	15	56	Industrial applicants
Left Hand	15	50	Adult workers
Both Hands	10	13	Industrial applicants
Both Hands	10	3	Adult workers
Assembly	32	48	Industrial applicants
Assembly	32	29	Adult workers

Mr. Streeter scored average to low when compared with industrial applicants and adult workers. Overall, his scores indicate that he has the necessary finger dexterity for many jobs and training programs that would be considered for vocational rehabilitation purposes that require this worker trait.

The *Bennett Hand Tool Dexterity Test* provides a measure of manual dexterity through the use of common hand tools. Mr. Streeter scored as follows:

<u>Raw Score</u>	<u>Percentile</u>	<u>Norm Group</u>
5'44"	95	Applicants for assembly and maintenance jobs
344"	96	Adult workers

Mr. Streeter scored high on this hand-tool dexterity test. Overall, his scores indicate that he has the necessary hand-tool dexterity for jobs that would typically be considered for vocational rehabilitation purposes.

The *Minnesota Clerical Test* is a test of clerical speed and accuracy. Mr. Streeter scored as follows:

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<u>Subtest</u>	<u>Raw Score</u>	<u>Percentile</u>	<u>Norm Group</u>
Number Comparison	82	10	Bank clerks
Number Comparison	82	20	Retail store employees
Number Comparison	82	18	Adult workers
Name Comparison	68	5	Bank clerks
Name Comparison	68	20	Retail store employees
Name Comparison	68	13	Adult workers

Mr. Streeter scored low average to low on this test of clerical aptitude. His scores indicate that he has the necessary clerical aptitude for many jobs that would be considered for vocational rehabilitation services that require this worker trait.

The *Bennett Mechanical Comprehension Test* has been designed to measure one's ability to perceive and understand the relationship of mechanical elements and physical forces in practical situations. Mr. Streeter scored as follows:

<u>Raw Score</u>	<u>Percentile</u>	<u>Norm Group</u>
39	40	Technical products company employees
39	32	Adult workers

Mr. Streeter scored average to low average on this test of mechanical comprehension. Overall, his score indicates that he has the necessary mechanical comprehension for jobs and training programs that would typically be considered for vocational rehabilitation purposes that require this worker trait.

The *Gates-MacGinitie Reading Tests* provide a measure of academic achievement for reading comprehension. When compared with entering community college students, Mr. Streeter scored as follows:

<u>Subtest</u>	<u>Raw Score</u>	<u>Percentile</u>	<u>Grade</u>
Comprehension	17	4	7.1

Mr. Streeter scored at the 7th grade level on this test of reading comprehension. His score is low when compared with that of entering community college students. Overall, his score indicates that he has the necessary reading comprehension for many jobs and training programs that would typically be considered for vocational rehabilitation purposes.

Testing Observations

All of the above tests were administered on the same day as the interview. The interview lasted 2.4 hours. The tests were administered from 11:30 a.m. to 3:10 p.m., with a 25-minute lunch

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break from 11:55 a.m. to 12:20 p.m. The tests were administered within an average amount of time. There was no need for extra or extended breaks.

Mr. Streeter took ibuprofen during the break between the interview and the testing session.

Specifically, Mr. Streeter sat for the *Dvorine Color Vision Test*. He identified all of the numbers accurately and quickly. He continued to sit for the Spelling subtest of the *Wide Range Achievement Test*. He used a standard pencil to print his responses.

At the beginning of the Math Computation subtest of the *Wide Range Achievement Test*, I explained to Mr. Streeter how he could alternate between sitting and standing in the testing room. He then stood at the beginning of this test. I offered him an ergonomic pen, but he indicated that a standard pencil was sufficient. I asked if he had any difficulty flexing his neck to work on the flat surface of the table and he indicated that this was not a problem for him. Partway through this 15-minute test, he changed from standing to sitting at the testing table.

There was a lunch break from 11:55 a.m. to 12:20 p.m. After the lunch break, he sat for the *Wechsler Abbreviated Scale of Intelligence*. He continued to sit for the *Purdue Pegboard*. I noticed that he performed better with his left hand than his right hand alone, although he is right-handed. When I commented on this, he noted that when he does drawing for his duct tape artwork, he will use his left hand since this results in a more unusual design than while using his right hand.

He then stood for the *Bennett Hand-Tool Dexterity Test*, which is the usual fashion. He demonstrated very good use of common hand-tools.

Mr. Streeter then sat for the *Minnesota Clerical Test*. He used an ergonomic pen to make his marks. I suggested taking a break at the end of this test, but he wanted to continue in order to return home before heavy commute traffic.

Next, he sat for the *Bennett Mechanical Comprehension Test*. He used a standard pencil to make his marks. After about 5 minutes, he switched to standing. After about 5 minutes of standing, he returned to sitting.

He then sat for the final test, the *Gates-MacGinitie Reading Tests*. He used a standard pencil to make his marks. After about 10 minutes, he switched to standing.

As Mr. Streeter left the office, I gave him the contact information for the California Department of Rehabilitation and the Employment Development Department's One-Stop Career Center, both with offices in Modesto, California.

Transferable Skills Analysis

Mr. Streeter's transferable skills were then assessed in an effort to identify those which might transfer to other occupations at this point, either directly or following vocational training. I used

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the *McCroskey Transferable Skills Program*, a well researched and reliable computerized transferable skills program for this purpose. I also made use of my experience in assessing transferable skills for other clients. The reliability of the software program has been confirmed through several studies (McCroskey, 1979; Wattenbarger, 1981; McCroskey, Smolarski, & Haskin, 1995, 1996; Grimley, Williams, Hahn, & Dennis, 2000; McCroskey, Grimley, Williams, Hahn, Lowe, Wattenbarger, Stein, & Dennis, 2002). The validity of the software program has also been confirmed through numerous studies (McCroskey, 1979; Wattenbarger, 1981; McCroskey & Perkins, 1981; McCroskey, Streeter, Wattenbarger, Feldbaum, & Dennis, 1997; Dennis & Dennis, 1998; McCroskey & Hahn, 1998; Grimley, Williams, Hahn, & Dennis, 2000; McCroskey, Hahn, & Dennis, 2002; McCroskey, Hahn, Dennis, & Wattenbarger, 2002). The *McCroskey Transferable Skills Program* is a tool that uses a scientific approach and current technology to assess job skills. The results of the computerized transferable skills analysis are then used by the vocational expert in developing opinions regarding employability and earning capacity.

The transferable skills analysis was conducted while following the opinions of the agreed medical evaluators, Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle. The opinions of Dr. Springle may be addressed through test scores. McCroskey and Dennis (2002) learned that worker traits related to reasoning, math, language, spatial perception, form perception, clerical perception, motor coordination, manual dexterity, finger dexterity, and eye/hand/foot coordination may be impacted by emotional trauma. I also considered Mr. Streeter's work history, test scores, and interview data. Among other things, I assumed an ability to lift and push up to 20 lbs. and to carry and pull up to 10 lbs., a need to alternate sitting, standing, and walking, no or an occasional ability to climb, bend, stoop, crouch, squat, kneel, crawl, and reach, and a frequent to constant ability to handle, finger, feel, talk, hear, write, and see.

All of the data that were entered into the computer program regarding Mr. Streeter's work history, test scores, physical capacities, and environmental tolerances are outlined in the attached computer-generated reports. Any data inputs to the worker trait profiles are also included in the attached reports. The purpose of all the data inputs is to create a worker trait profile that most accurately reflects the client's abilities and skills. The software program then compares the client's worker trait profile with the requirements of jobs in the database to determine whether there are any job matches. Job matches and other information regarding the results of the transferable skills analysis can be found in the attached *McCroskey Transferable Skills Program* reports.

As a result of the transferable skills analysis, based on the skills in his work history and his test scores, Mr. Streeter had 1,118 pre-injury job matches from a database of 2,926 jobs that are frequently available in Stanislaus County where he had some or all of the skills required for employment. The pre-injury job matches are equal to 38% of the database of jobs in Stanislaus County, which suggests that Mr. Streeter had pre-injury access to 38% of jobs in the open labor market.

Post-injury, there were 342 job matches from the same database of 2,926 jobs that are frequently available in Stanislaus County where Mr. Streeter has some of the skills required for

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employment. The post-injury job matches are equal to 12% of the database of jobs. The difference between 38% pre-injury labor market access and 12% post-injury labor market access suggests that Mr. Streeter has a residual labor market access of 31%.

Examples of job matches in Stanislaus County are as follows:

- Quality assurance group leader
- Quality assurance monitor
- Cupboard builder
- Assembly inspector
- Cashier-checker
- Quality control inspector
- Inspector, packaging materials
- Electrical assembler
- Storage facility rental clerk
- Cashier, courtesy booth
- Electronics utility worker
- Assembler II
- Electrical equipment tester
- Solderer
- Quality control checker
- Quality control technician
- Companion
- Ticket seller
- Inspector
- Taxi cab starter
- Quality control technician
- Shipping order clerk
- Dispatcher, radio
- Inspector, general
- Electronics inspector
- Referral and information aide
- Customer service representative
- Dispatcher, maintenance service
- Scheduler, maintenance
- Dispatcher, motor vehicle
- Boat rental clerk
- Electronics tester
- Quality control clerk
- Assembly line inspector
- Animal shelter clerk
- Mail clerk
- Surveillance system monitor
- Inspector, soldering
- Ticket taker

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Electronics worker

Any of the above job matches would need to be considered carefully by Mr. Streeter to ensure that all of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle are observed.

An alternative scenario of the transferable skills analysis was completed in relation to *Ogilvie III* regarding nonindustrial factors. *Ogilvie III* states at page 15, "The application of the rating schedule is not rebutted by evidence that an employee's loss of future earnings is greater than the earning capacity adjustment that would apply to his or her scheduled rating due to nonindustrial factors." Examples of nonindustrial factors are described at page 11 of *Ogilvie III* as including "general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education." To abide by this portion of *Ogilvie III*, Mr. Streeter's transferable skills analysis was completed through the work history profile method, which includes consideration of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle as well as the skill level of jobs in Mr. Streeter's work history. Test scores were intentionally excluded for this alternative analysis since they may address nonindustrial factors such as illiteracy, proficiency to speak English, or lack of education. For similar reasons, the nonindustrial factor of general economic conditions is also not included in this analysis.

As a result of the transferable skills analysis under this alternative scenario designed to be consistent with *Ogilvie III* with respect to the proscription from considering nonindustrial factors, there were 105 pre-injury job matches from the same database of 2,926 jobs that are frequently available in Stanislaus County where Mr. Streeter had some or all of the skills required for employment. This is equal to labor market access of 4%.

Under the alternative scenario, there were 39 post-injury job matches from the same database of 2,926 jobs that are frequently available in Stanislaus County where Mr. Streeter has some or all of the skills required for employment. The post-injury job matches are equal to 1% of the database of jobs in Stanislaus County. Therefore, comparing pre-injury labor market access of 4% with post-injury labor market access of 1% results in residual labor market access of 37% under this alternative scenario designed to be consistent with the requirements of *Ogilvie III* regarding nonindustrial factors.

Examples of job matches under the alternative scenario are as follows:

- Surveillance system monitor
- Locker room attendant
- Deliverer, outside
- Children's attendant
- Mat sewer
- Burr grinder

Any of the above job matches would need to be considered carefully by Mr. Streeter to ensure that all of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle are observed.

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Typical skills associated with transferable skills groups from jobs in Mr. Streeter's work history are outlined below.

Inserts sealing strips, wiring, insulating material, ladders, flanges, gauges, and valves, depending on type of structure being assembled.

Cuts and welds steel members to make alterations, using oxyacetylene welding equipment.

Bucks (holds) rivets while Riveter, Pneumatic uses air-hammer to form heads on rivets.

Catches hot rivets tossed by River Heater in bucket and inserts rivets in holes, using tongs.

Signals worker operating hoisting equipment to lift and place structural-steel member.

Verifies vertical and horizontal alignment of structural-steel members, using plumb bob and level.

Fastens structural-steel members to cable of hoist, using chain, cable, or rope.

Bolts aligned structural-steel members in position until they can be permanently riveted, bolted, or welded in place.

Drives drift pins through rivet holes to align rivet holes in structural-steel member with corresponding holes in previously placed member.

Forces structural-steel members into final position, using turnbuckles, crowbars, jacks, and hand tools.

Pulls, pushes, or pries structural-steel member into approximate position while member is supported by hoisting device.

Guides structural-steel member, using tab line (rope), or rides on member in order to guide it into position.

Vocational Feasibility

When considering the opinions of Dr. Green, Dr. Gregson, and Dr. White, Mr. Streeter retains the medical capacity to work. Therefore, when considering the opinions of Dr. Green, Dr. Gregson, and Dr. White, Mr. Streeter would be able to benefit from vocational rehabilitation services. When considering the opinions of Dr. Springle, Mr. Streeter has mild psychiatric symptoms. Therefore, Mr. Streeter would be able to benefit from vocational rehabilitation services when considering the opinions of Dr. Springle. But, Dr. Springle also noted that, "At some point, if he is taking a job that requires focus and concentration at a high level, then he will have to be off the marijuana."

There are many vocational factors that would have a positive impact on Mr. Streeter's ability to benefit from vocational rehabilitation services. Among other things, he built cabinets for electronics components just after high school. He then worked as an iron worker from 1980 to 11/26/05. Part of this time, he worked as a foreman. His performance on the standardized tests indicates that he has potential to learn new job skills in school or on the job. There were many job matches on the transferable skills analysis where he has some of the skills required for employment. Some of the job matches were for unskilled jobs, which by definition do not require transferable skills. Mr. Streeter has been pursuing an interest in artwork at his own direction at home. He is pleasant and personable. All of these vocational factors suggest that Mr. Streeter would be able to benefit from vocational rehabilitation services.

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At the same time, there are several additional vocational factors that would have a negative impact on Mr. Streeter's vocational feasibility. Among other things, he has not worked since 11/26/05. He is concerned about how employers and co-workers would perceive him as an employee with a disability who needed to change positions at work. He reported a significant level of pain in several areas of his body. He uses ibuprofen and marijuana for pain control. He will need to stop using marijuana for jobs that require concentration and focus at a high level, according to Dr. Springle. He has modified or ceased some activities of daily living. He does not have any specific vocational plans for work within his medical restrictions. These additional vocational factors would likely have a negative impact on Mr. Streeter's ability to benefit from vocational rehabilitation services. However, he should be able to address them with the assistance of a certified rehabilitation counselor.

In summary, when considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle, Mr. Streeter would be able to benefit from vocational rehabilitation services. Some vocational factors would have a positive impact on his ability to benefit from vocational rehabilitation services while others would need to be addressed, probably with the assistance of a professional counselor. These services are available in Modesto, California. Therefore, when considering all of the medical information in combination with all the vocational information, Mr. Streeter would be able to benefit from vocational rehabilitation services.

Labor Code Section 4662 and *Almaraz/Guzman* Analysis

Facts pertaining to Mr. Streeter's employability as well as issues related to *Almaraz/Guzman* are addressed in the Employability Analysis section of the report, which clarifies the impact of Mr. Streeter's work injury on his employability.

Mr. Streeter's ability to rebut the FEC adjustment in the 2005 *Schedule for Rating Permanent Disabilities* will be addressed in the Diminished Future Earning Capacity Analysis section later in this report.

Employability Analysis

All of the information collected to that point in the vocational rehabilitation evaluation was then applied to local labor market opportunities and requirements of employers for specific occupations. The overall purpose of the employability analysis is to assess an individual's ability to both obtain and maintain employment in the open labor market. Among other things, as a part of this analysis, I systematically considered all occupations performed throughout Stanislaus County while using the *Occupational Employment Quarterly II 2.0* (2010) as a guide. According to the publisher (T.D. Vander Vegt, personal communication, August 22, 2007), this and other reports from U.S. Publishing are commonly used throughout the United States by hearing representatives who represent claims before the Social Security Administration, as well as by contract vocational experts for the Social Security Administration and rehabilitation counselors and vocational experts in workers' compensation, personal injury, and other venues.

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In addition, I reviewed information about jobs and wages from *Occupational Employment (2004) & Wage (2005) Data* for the State of California, a publication of the California Employment Development Department. I also made use of my experience in developing rehabilitation plans and completing vocational rehabilitation evaluations during this analysis of labor market opportunities for Mr. Streeter.

I. Labor Market Access

The employability analysis began with an assessment of Mr. Streeter's labor market access, that is, the percentage of his access to jobs in the open labor market.

A. Medical Labor Market Access

Medical labor market access addresses the availability of occupations in the open labor market that are compatible with the medical restrictions of evaluating and treating physicians. The primary consideration is the physical or psychiatric ability to perform work-like activities. The vocational suitability of any jobs identified as being physically appropriate is a secondary consideration.

1. Functional Limitations, Work Restrictions, Psychiatric Impairments, and Whole Person Impairments

The opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle as the agreed medical evaluators were followed for this analysis of Mr. Streeter's medical labor market access.

a. Opinions of Dr. Green

December 22, 2008, David Green, M.D., Agreed Medical Evaluation (Orthopedic Surgery)

Permanent and stationary as of 12/22/08.

Subjective factors:

Regarding the bilateral hips:

Slight and intermittent.

Regarding the bilateral ankles:

Slight and intermittent.

Regarding the bilateral shoulders:

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Moderate and frequent on the right, slight and intermittent on the left.

Regarding the bilateral knees:

Severe and intermittent on the right, moderate and frequent on the left.

Work restrictions:

Regarding the right shoulder:

No repetitive use above shoulder level.
No forceful push-pull activities.
No heavy lifting.

Regarding the left shoulder:

No repetitive forceful above shoulder activities.

Regarding the knees:

No substantial work.

Regarding the hips, ankles, and feet:

Subsumed by the disability that is attached to the knees.

Qualified injured worker medically.

December 8, 2008, David Green, M.D., Impairment Rating Report

AMA Guides:

<u>Body Part</u>	<u>WPI</u>
LUE	3%
RUE	5%
LLE	23%
RLE	23%

March 22, 2009, David Green, M.D., Supplemental Report

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December 21, 2009, David Green, M.D., Agreed Medical Re-evaluation

The focus of this evaluation was the bilateral knees.

Not yet permanent and stationary following right total knee replacement.

Subjective factors:

Regarding the right knee:

Halfway between slight and moderate and intermittent.

Regarding the left knee:

Halfway between moderate and severe and intermittent.

Work restrictions:

Mr. Streeter was TTD.

Work loss:

“Mr. Streeter remains retired and is not looking for gainful employment.”

February 3, 2010, David Green, M.D., Supplemental Report

December 17, 2010, David Green, M.D., Agreed Medical Re-evaluation

The examination was confined to the lower extremities.

Permanent and stationary as of 11/15/10.

Subjective factors:

Regarding the knees:

Halfway between slight to moderate and intermittent on the right and moderate to frequent on the left.

Work restrictions:

Limited to semi-sedentary work.

Vocational rehabilitation:

“As noted, Mr. Streeter has retired, is on Social Security Disability, and will not be returning to the workforce.”

Mr. Streeter had decided not to proceed with total knee replacement surgery on the left.

November 15, 2010, David Green, M.D., Impairment Rating Report

AMA Guides:

<u>Body Part</u>	<u>WPI</u>
LLE	23%
RLE	30%

October 20, 2009, Deposition of David Green, M.D.

There was 10% apportionment to obesity for the knees, hips, and ankles.

Any apportionment to osteoarthritis is encompassed in the 10% apportionment to the obesity.

b. Opinions of Dr. Gregson

November 21, 2008, Ralph Gregson, M.D., Agreed Medical Evaluation (Otolaryngology)

Permanent and stationary for hearing loss.

Not a qualified injured worker for hearing loss.

Apportionment of hearing loss:

95% industrial.
5% non-industrial, particularly to driving motorcycles

AMA Guides:

<u>Body Part</u>	<u>WPI</u>
Hearing loss	0%

Maximum ear protection was recommended, “including in-the-ear inserts and earmuffs, when he is exposed to noise levels in excess of 85 decibels.

c. Opinions of Dr. White

February 6, 2009, Larry F. White, M.D., Agreed Medical Evaluation (Internal Medicine)

Permanent and stationary and MMI as of 2/6/09 for hypertension, sleep/arousal disorder, and sexual dysfunction.

Work restrictions:

Avoid exposure to undue levels of emotional stress.

AMA Guides:

<u>Body Part</u>	<u>WPI</u>
Hypertension	5%
Sleep disorder	3%
Sexual dysfunction	2%

Apportionment:

100% industrial.

Vocational rehabilitation:

Unable to return to his usual and customary work.
Sleep and arousal disorder would interfere with his ability to work from height given his tendency for reduced level of daytime alertness.

d. Opinions of Dr. Springle

March 17, 2009, Peter W. Springle, M.D., Agreed Medical

Evaluation (Psychiatry)

GAF is 51.

Impairment:

The applicant has a temporary partial psychiatric disability. In my opinion, the applicant should not be working at height or around dangerous equipment if he is going to continue to use cannabis with the various complications, primarily cognitive and focusing. It is felt at this time that the applicant's symptoms are mild. This is felt to be the case because the applicant has not yet begun to deal with his future. He has something to do, namely get further surgeries, in order to improve. While he does have limitations, he cannot do any dangerous type of work that requires focus and concentration. He does have lowered energy level and drive but still is active within the family and he still is pursuing some creative types of activities such as art. This taken together with the medical records and psychological testing suggests that the applicant should be considered to be in the mild level of disability at this time, however considering that he cannot work at heights or dangerous types of jobs in light of the marijuana.

Future medical care:

The applicant is in need of psychiatric treatment to help him deal with the fact that he has physical limitations and cannot return back to his former line of work and for him to form some new lines of interest and ways of executing activities. At the same time, he should be helped to develop alternatives to the use of marijuana for pain relief. Treatment could be carried out by a cognitive-behavioral therapist if needed with adjunctive antidepressant medication. The applicant should have the benefit of sixteen sessions of cognitive-behavioral therapy and perhaps some additional treatment if his use of marijuana continues to be a problem. This presumes that the applicant will be declared permanent and stationary as of the time he

was seen by the undersigned. This presumes that everything will go well with the upcoming surgery and that he will not worsen when he has to deal with the future. Strategies for pain control including yoga and meditation and Pilates should be entertained. In my opinion, marijuana is not an option for pain control on a continuing basis because of the side effect profile.

If the applicant wishes to settle, then the applicant should be considered to be permanent and stationary as of the time that he was seen and evaluated by the undersigned on 3/17/09. What will happen going forward is unknown but clearly the applicant has not faced or has not had to face his future although it is in the back of his mind. The situation probably will get somewhat worse at that time. At some point, if he is taking a job that requires focus and concentration at a high level, then he will have to be off the marijuana.

2. Medical Labor Market Access with the Opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle

Mr. Streeter's medical labor market access was then assessed when considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle. In determining Mr. Streeter's medical labor market access, I systematically considered all jobs performed throughout Stanislaus County while using the *Occupational Employment Quarterly II 2.0* (2010) as a guide. The following information can be considered when determining the percentage of jobs in the open labor market that falls within the medical restrictions reported by Dr. Green, Dr. Gregson, and Dr. White and the psychiatric impairments reported by Dr. Springle.

- a. The *Occupational Employment Quarterly II 2.0* (2010) quantifies the number of people employed by occupation by physical demand (sedentary, light, medium, heavy, and very heavy). According to the *Dictionary of Occupational Titles*, sedentary work involves exerting up to 10 lbs. of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, and/or otherwise move objects, including the human body. Light work involves lifting, carrying, pushing, and pulling up to 20 lbs. on occasion, and up to 10 lbs. frequently. Sedentary work involves sitting at least two-thirds of the workday, while light work involves standing and walking more than one-third of the workday.

- b. Total Stanislaus County labor force, according to the *Occupational Employment Quarterly II 2.0* (2010) = 191,800.
- c. Sedentary jobs (Stanislaus County):
 - 1) Unskilled employment = 1,074 or 0.56% of the total labor force.
 - 2) Semi-skilled employment = 7,112 or 3.71% of the total labor force.
 - 3) Skilled employment = 27,303 or 14.24% of the total labor force.
 - 4) Total sedentary jobs = 35,489 or 18.50% of the total labor force.
- d. Light jobs (Stanislaus County):
 - 1) Unskilled employment = 15,303 or 7.98% of the total labor force.
 - 2) Semi-skilled employment = 20,314 or 10.59% of the total labor force.
 - 3) Skilled employment = 50,234 or 26.19% of the total labor force.
 - 4) Total light jobs = 85,851 or 44.76% of the total labor force.
- e. Therefore, 18.50% (sedentary jobs) + 44.76% (light jobs) = 62.69% of the total labor force.
- f. On 12/17/10, Dr. Green reported that regarding the knees, Mr. Streeter is limited to semi-sedentary work. It is estimated that half of a combination of sedentary and light jobs would be compatible with this limitation.

Therefore, 62.69% (sedentary and light jobs) x .5 = 31.34% of the total labor force. This is an estimate of the percentage of jobs in Stanislaus County that is compatible with the limitations to this point.

- g. On 12/22/08, Dr. Green reported that regarding the right shoulder, Mr. Streeter was precluded from repetitive use above shoulder level. This is equal to a standard rating of 8%. As such, it is estimated that 90% of the remaining occupations would be compatible with this additional limitation.

Therefore, $31.34\% \text{ (suitable jobs from above)} \times .9 = 28.20\%$. This is an estimate of the percentage of jobs in Stanislaus County that is compatible with all of the limitations to this point.

- h. On 12/22/08, Dr. Green also reported that regarding the right shoulder, Mr. Streeter was precluded from forceful push-pull activities. This results in a standard rating of 7%. As such, it is estimated that 90% of the remaining occupations would be compatible with this additional limitation.

Therefore, $28.20\% \text{ (suitable jobs from above)} \times .9 = 25.38\%$ of the total labor force. This is an estimate of the percentage of jobs in Stanislaus County that is compatible with all of the limitations to this point.

- i. Dr. Green also reported on 12/22/08 that Mr. Streeter was precluded from heavy lifting regarding the right shoulder and from repetitive forceful above shoulder activities regarding the left shoulder. These additional preclusions would not result in any further reduction in Mr. Streeter's medical labor market access.

Therefore, when considering all of the opinions of Dr. Green, Mr. Streeter has access to 25.38% of jobs in Stanislaus County.

- j. Dr. Gregson reported on 11/21/08 that Mr. Streeter is not a qualified injured worker for hearing loss and that his whole person impairment for hearing loss is 0%. However, maximum ear protection was recommended. When considering the opinions of Dr. Gregson, it is unlikely there would be any further reduction in Mr. Streeter's medical labor market access.

- k. Dr. White reported on 2/6/09 that Mr. Streeter's sleep and arousal disorder would interfere with his ability to work from heights given his tendency for reduced level of daytime alertness. Given the nature of the occupations that have already been rejected, it is unlikely that there would be any further reduction in Mr. Streeter's medical labor market access related to this work preclusion.

1. Dr. White also reported on 2/6/09 that Mr. Streeter should avoid exposure to undue levels of emotional stress. This results in a standard rating of 20%. As such, it is estimated that 80% of the remaining occupations would be compatible with this work preclusion.

Therefore, 25.38% (suitable jobs from above) x .8 = 20.30% of the total labor force. This is an estimate of the percentage of jobs in Stanislaus County that is compatible with all of the opinions of Dr. Green, Dr. Gregson, and Dr. White.

- m. Dr. Springle reported on 3/17/09 that Mr. Streeter “should not be working at height or around dangerous equipment if he is going to continue to use cannabis with the various complications, primarily cognitive and focusing.” Dr. Springle found a GAF score of 51. However, Dr. Springle reported, “It is felt at this time that the applicant’s symptoms are mild.” Dr. Springle reported further, “At some point, if he is taking a job that requires focus and concentration at a high level, then he will have to be off the marijuana.” When considering all of the opinions of Dr. Springle, along with reductions made earlier for emotional stress, it is estimated that at least 75% of the remaining occupations would be compatible with the opinions of Dr. Springle.

Therefore, 20.30% (suitable jobs from above) x .75 = 15.22% of the total labor force. This is an estimate of the percentage of jobs in Stanislaus County that is compatible with all of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle.

- n. Examples of occupations for Mr. Streeter to consider selectively in Stanislaus County while following the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle are as follows:

<u>Occupation</u>	<u>Number Employed</u>	
	<u>Sedentary Jobs</u>	<u>Light Jobs</u>
Architectural and civil drafters	137	141
Mechanical drafters	123	46
Ushers, lobby attendants, and ticket takers		92
Cashiers	1,358	3,541
Counter & rental clerks	24	456
Customer service representatives	1,001	754
File clerks	123	251

Receptionists and information clerks	1,116	442
Dispatchers, except police, fire, and ambulance	280	80
Office clerks, general	1,841	1,380
Graders and sorters, agricultural products		539
Electrical and electronic equipment assemblers	4	82
Electromechanical equipment assemblers		5
Inspectors, testers, sorters, samplers, and weighers	124	1,079
Jewelers and precious stones and metal workers	7	16
Packers and packagers, hand	47	683

- o. The opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle were considered predominantly in selecting the above occupations. Vocational factors were not considered, except for selecting occupations that may be consistent with Mr. Streeter's work and school history.
- p. Specific positions within the above list of occupations will need to be considered selectively by Mr. Streeter to ensure that they are compatible with the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle.

B. Vocational Labor Market Access and Placeability

Vocational labor market access and placeability consider both medical and vocational factors. They address an individual's ability to obtain and maintain employment. As such, vocational labor market access and placeability consider the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle. In addition, vocational factors such as Mr. Streeter's work and school history, test scores, transferable skills, personal presentation, demonstrated ability to perform work-like activities, the effects of pain and medication, the effects of outward signs of disability, the results of vocational rehabilitation efforts, and the requirements of employers were also considered in assessing Mr. Streeter's vocational labor market access and placeability. Vocational feasibility, one's ability to benefit from the provision of vocational rehabilitation services, was also considered in assessing Mr. Streeter's vocational labor market access and placeability.

1. Vocational Labor Market Access and Placeability Factors

- a. The opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle**
- b. July to August 2011, Eugene E. Van de Bittner, Ph.D., CRC, Diminished Future Earning Capacity Evaluation**

Mr. Streeter completed the interview and testing session in one day after driving from his home in Manteca to the office in Walnut Creek, California.

Mr. Streeter has a California driver's license, reliable transportation, and estimated a reasonable commute as less than 5 minutes from home.

Mr. Streeter described a significant level of pain in several areas of his body. He takes ibuprofen for knee pain. He takes Cozaar for hypertension and uses marijuana for pain control and relaxation.

Mr. Streeter has modified some activities of daily living and avoids others.

Mr. Streeter is concerned about attempting to return to work within his medical restrictions because of how an employer or co-workers would view his need to alternate sitting and standing positions. In addition, he is not sure how long he would be able to work within his medical restrictions.

Academically, Mr. Streeter is a high school graduate.

Vocationally, Mr. Streeter worked briefly as an assembler of frames and cabinets for electronics equipment. From 1980 to 11/26/05, he worked as a union iron worker. During part of this time, he worked as a foreman.

The results of the standardized tests indicate normal color vision. Mr. Streeter reads at the 7th grade level, spells at the 6th grade level, and performs math computations at the 8th grade level. His estimated intellectual functioning is low average. His finger dexterity is average to low. His hand-tool dexterity is high. His clerical aptitude is low average to low. His mechanical comprehension is average to low average.

The results of the transferable skills analysis showed initial pre-injury labor market access of 38% and 1,118 job matches from a database of 2,926 jobs that are frequently available in Stanislaus County where Mr. Streeter had some of the skills required for employment. His post-injury labor market access was 12%, which included 342 job matches from the database of jobs.

Under an alternative work history profile analysis that did not include test scores, Mr. Streeter had pre-injury labor market access of 4%, which included 105 jobs from the same database of 2,926 jobs that are frequently available in Stanislaus County where he had some or all of the skills required for employment. His post-injury labor market access was 1%, which included 39 job matches from the database of jobs. Examples of job matches were provided.

For reasons indicated above, when considering all of the medical and vocational information, Mr. Streeter is able to benefit from vocational rehabilitation services.

2. Jobs in the Open Labor Market

It was learned above that Mr. Streeter has access to 15.22% of jobs in Stanislaus County when considering all of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle.

When considering all of the vocational factors outlined above, Mr. Streeter would continue to have access to a variety of jobs in the open labor market. Examples are as follows:

- General office clerk
- Information clerk
- Customer service representative
- Inspector
- Packer and packager
- Counter and rental clerk
- Cashier
- Lobby attendant
- Ticket taker
- Assembler

With formal training, drafter occupations would also be available to Mr. Streeter.

II. Labor Market Research

Labor market research was conducted to determine whether or not job openings exist in the open labor market that are compatible with the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle and vocational factors affecting employability. In general, several job openings were identified when considering the medical opinions and vocational information. The most promising jobs from the labor market research include customer service representative, packager, lobby attendant, box office/ticket taker, receptionist/cashier, and drafter following training.

III. Employability Analysis Summary

In summary, the first part of the Employability Analysis clarified Mr. Streeter's labor market access, both medically and vocationally. His medical labor market access was assessed while considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle. While doing so, it was learned that Mr. Streeter has access to 15.22% of jobs in Stanislaus County.

When considering Mr. Streeter's vocational labor market access and placeability, that is, considering a combination of medical and vocational factors outlined in the Vocational Labor Market Access and Placeability section above, Mr. Streeter would continue to have access to a variety of jobs in the open labor market.

Labor market research was also completed as a part of this employability analysis. When considering the medical and vocational information, numerous job openings were identified for Mr. Streeter to consider.

Return to Work Options

When considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle together with vocational factors affecting employability, the following occupations have been identified as being most suitable for Mr. Streeter:

Occupation

Inspector
Information clerk
Counter and rental clerk
Cashier
Customer service representative
Assembler
Packer
General office clerk
Ticket taker
Service dispatcher

Drafter, following training

Access to the Labor Market

Mr. Streeter's medical labor market access was addressed above, and the results were provided in the Employability Analysis section above.

Placeability

Placeability refers to an individual's ability to obtain and maintain employment. Placeability factors were addressed in the Vocational Feasibility as well as in the Vocational Labor Market Access and Placeability sections of the report.

Earning Capacity

According to *Black's Law Dictionary* (Garner, 1999) earning capacity is defined as "[a] person's ability or power to earn money, given the person's talents, skills, training, and experience" (pp. 547-548). According to Horner and Slesnick (1999), "Earning capacity is the expected earnings of a worker who chooses to maximize the expectation of actual earnings" (p. 15). Finally earning capacity has also been defined as the "ability of (an) individual to obtain and hold the highest paying of jobs to which he or she would have access. Access is determined by worker traits, work skills and amount of training" (Weed & Field, 2001, p. V-7).

I. Pre-injury Earning Capacity

Mr. Streeter's pre-injury earning capacity is established by his W-2 Wage and Tax Statements for 2004 and 2005. In 2004, his W-2 earnings were \$51,456.93. In 2005, his W-2 earnings through 11/25/05 were \$45,678.75, which is equivalent to \$50,537.76 in annual earnings. Therefore, the average of Mr. Streeter's 2004 and 2005 earnings is $\$51,456.93 + \$50,537.76 \div 2 = \$50,997.34$. This represents his pre-injury earning capacity. \$50,997.34 is equal to \$24.51 per hour for a 40-hour workweek.

II. Post-injury Earning Capacity

Using the Most Suitable Jobs Approach

The basis of Mr. Streeter's post-injury earning capacity is the wage for drafters, an occupation that is suitable for Mr. Streeter following vocational training. As an alternative, his post-injury wage is the average wage for the direct placement occupations of cashiers and ushers, lobby attendants, and ticket takers. All wages outlined below are in 2005 dollars from the California Employment Development Department's *Occupational Wages* for the State of California. Mr. Streeter worked in multiple counties in the past. 2005 wages are used as the base year wage for comparison of pre-injury and post-injury earning capacity since it is assumed that wage growth for both pre-injury and post-injury occupations is comparable.

Scenario 1: Occupations following vocational training

<u>Occupation</u>	2005 Wages for the State of California	
	<u>25th Percentile</u>	<u>50th Percentile</u>
Drafters	\$16.90	\$21.98

Scenario 2: Occupations through direct job placement

<u>Occupation</u>	2005 Wages for the State of California	
	<u>50th Percentile</u>	<u>75th Percentile</u>
Cashiers	\$8.63	\$10.79
Ushers, lobby attendants, and ticket takers	\$8.15	\$9.32
Average	\$8.39	\$10.05

It is estimated that Mr. Streeter's past training, skills, and work experience combined with approximately two years of drafter training would qualify him for work as a drafter at the 25th percentile. This wage is \$16.90 per hour. It is estimated that Mr. Streeter would advance to the 50th percentile following 3 years of employment. This wage is \$21.98 per hour.

For the occupations of cashiers and ushers, lobby attendants, and ticket takers, it is estimated that Mr. Streeter's training, skills, and work experience would qualify him for work at the 50th percentile. This wage is \$8.39 per hour. It is estimated that he would advance to the 75th percentile following 3 years of employment. The wage at the 75th percentile is \$10.05 per hour.

I also considered 2 years for drafter training, including any prerequisite training followed by 6 months for job placement services, from the date of maximum medical improvement with the assistance of a certified rehabilitation counselor or job placement counselor to represent a reasonable length of time for training and job search activities for the occupation of drafters. I considered 6 months from the date of maximum medical improvement with the assistance of a certified rehabilitation counselor or job placement counselor to represent a reasonable length of time for job search activities for the occupations of cashiers and ushers, lobby attendants, and ticket takers.

Montana Factors

Ogilvie I states at page 33:

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. . . Yet, when a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity. As the Supreme Court stated years ago in *Argonaut Ins. Co. v. Industrial Ace. Com. (Montana)* (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130,133] (*Montana*):

“An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. . . . [A] prediction [of earning capacity for purposes of permanent disability] is . . . complex because the compensation is for loss of earning power over a long span of time. . . . In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading. . . . [A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant.” (*Montana, supra*, 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133] (internal citations omitted).)

The results of an assessment of the *Montana* factors for Mr. Streeter are summarized below.

Ability to work. Mr. Streeter's ability to work is summarized in the Medical, Response to Injury, Functional Limitations, Work Restrictions, Psychiatric Impairments, and Whole Person Impairments sections above. Vocational issues related to Mr. Streeter's ability to work are outlined in the Vocational Labor Market Access and Placeability section above.

Age. Mr. Streeter is currently 50 years old.

Health. Mr. Streeter's health with respect to the impact of his medical condition on his ability to return to work is summarized in the Medical, Response to Injury, and Functional Limitations, Work Restrictions, Psychiatric Impairments, and Whole Person Impairments sections above. His current health is summarized further in the attached Record Review.

Willingness and opportunities to work. These issues are addressed in the Vocational Rehabilitation Efforts, Vocational Future, and Self-initiated Return to Work Activities sections above. They are addressed further in the Readiness to return to work section above.

Skills and education. These issues are addressed in the School and Training History, Work History, Vocational Testing, and Transferable Skills Analysis sections above. Mr. Streeter will be able to augment his job skills with drafter training for this vocational goal.

General conditions of the labor market. The unemployment rate in Stanislaus County is currently 17.5%. The current unemployment rate in the State of California is 12.4%.

Employment opportunities for persons similarly situated. Employment opportunities for persons similarly situated are described in the Labor Market Research section of the report.

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Labor Force Participation

Labor force participation refers to an individual's worklife expectancy. Mr. Streeter was out of the labor force following his last employment with Rugged Iron Company, Inc. on 11/26/05. He then underwent medical treatment and was eventually found to be permanent and stationary the last time on 11/15/10 for his knees by Dr. Green. Since that time, he has again been able to participate in the labor force within the medical restrictions assigned by Dr. Green, Dr. Gregson, and Dr. White, and the psychiatric impairments reported by Dr. Springle.

Diminished Future Earning Capacity Analysis – Scenario 1: Most Suitable Jobs Approach: Drafters

A diminished future earning capacity evaluation was considered in reference to the 7/29/11 *Ogilvie* decision to clarify whether “. . . the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury (p. 15).”

Mr. Streeter's diminished future earning capacity (DFEC) was then calculated under 2 scenarios. For Scenario 1, I considered the wages for the occupation of drafters, following recommended vocational training. For Scenario 2, I considered the wages for the occupations of cashiers and ushers, lobby attendants, and ticket takers. The wage of these suitable occupations was seen as being representative of Mr. Streeter's post-injury earning capacity when considering all available medical and vocational information under the most suitable jobs approach.

Through the *WCEC Formula* (Van de Bittner, 2006), the calculation of diminished future earning capacity is expressed in the following equation:

$$DFEC = f(WLE) \times \left[\frac{PRE-POST}{PRE} \right]$$

where:

DFEC = diminished future earning capacity
WLE = worklife expectancy
PRE = pre-injury earning capacity
POST = post-injury earning capacity
f = function of

This formula provides the vocational expert an empirically based methodology for calculating post-injury employability and resultant earning capacity. The post-injury earning capacity figure can then be applied to the formula to determine diminished future earning capacity expressed as a percentage.

Mr. Streeter's WPIs as reported by Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle were considered for this DFEC evaluation. The opinions of Dr. Green, Dr. Gregson, Dr. White, and

Dr. Springle are consistent with the descriptions and measurements of physical impairments and the corresponding percentage of impairments published in the AMA *Guides*.

I. Worklife Expectancy

- A. Maximum medical improvement date: 11/21/08 (Gregson); 12/22/08 (Green); 2/6/09 (White); 3/17/09 (Springle); 11/15/10 – knees (Green)

Age on 11/15/10: 50 years, 1 month

Worklife expectancy on 11/15/10: 11.61 years (Skoog & Ciecka, 2001)

II. Pre-injury Earning Capacity

- A. As noted above, Mr. Streeter's pre-injury earning capacity is represented by the average of his 2004 and his annualized 2005 wages from all employers on his W-2 Wage and Tax Statements. The average wage for 2004 and 2005 is \$50,997.34, which is equal to \$24.51 per hour for a 40-hour workweek.
- B. Assume benefits as a percentage of wages to be comparable (pre-injury and post-injury).

III. Post-injury Earning Capacity – Wage for Drafters Following Vocational Training

- A. The most suitable jobs approach was used for Scenario 1, based on the wage of drafters following vocational training as representing Mr. Streeter's post-injury earning capacity.
- B. The average wage for drafters at the 25th percentile was used as Mr. Streeter's wage for the first 3 years of employment, increasing to the 50th percentile after 3 years of new employment.
- C. Benefits are assumed to be comparable (post-injury and pre-injury).
- D. Assume Mr. Streeter would return to work following 2 years of training and 6 months of job search activities following his maximum medical improvement date, assuming he could have started school on or about 1/1/11. Conservatively, his return to work date would then be 7/1/13, with professional counseling assistance.
- E. Hourly wage as of 7/1/13: \$16.90
- F. Hourly wage after 3 years of new employment: \$21.98
- G. Average hourly wage for the first 5.5 years (2 years for training, 6 months for job

search, and 3 years of employment)

$$\$16.90 + \$21.98 \div 2 = \$19.44 \times 3 \text{ years} = \$58.32 \div 5.5 \text{ years} = \$10.60$$

H. Wages for remainder of worklife, post-injury:

$$11.61 \text{ years} - 5.5 \text{ years} = 6.11 \text{ years} \quad \$21.98$$

IV. DFEC Calculation – Drafters

A. Wages for the first 5.5 years:

$$\$10.60 \times 2,080 \times 5.5 \text{ years} \quad \$121,264.00$$

B. Plus wages for the next 6.11 years:

$$\$21.98 \times 2,080 \times 6.11 \text{ years} \quad \$279,339.42$$

C. Equals total FEC (post-injury earning capacity): \$400,603.42

D. Pre-injury earning capacity beginning at MMI date:

$$\$24.51 \times 2,080 \times 11.61 \text{ years} \quad \$591,884.80$$

E. Less post-injury earning capacity: \$400,603.42

F. Equals DFEC: \$191,281.38

G. Percentage of DFEC: 32%

H. Training and job search costs: Training cost of \$800.00 per month
 for 24 months (\$19,200.00 for tuition, fees, books, supplies, etc.)
 + \$9,000.00 for counselor fees (60 hours at \$150.00 per hour)
 + \$1,000.00 for mileage: \$29,200.00

I. Percentage of DFEC, when considering training and job search costs: 37%

The resulting percentage of DFEC for Mr. Streeter can be used as a substitute for the permanent disability rating in the 2005 *Schedule for Rating Permanent Disabilities* since the percentage of DFEC considers physical impairment, age, occupation, and earning capacity, unless the DFEC percentage is less than the rating under the *Schedule* after adjusting for age, occupation, and FEC. An alternative would be to use the DFEC percentage as a substitute for the FEC adjustment factor in the *Schedule*. Or, the percentage of DFEC for Mr. Streeter can be applied to the formula at page 1-6 in the 2005 *Schedule for Rating Permanent Disabilities* when combined with the unadjusted permanent disability rating.

Diminished Future Earning Capacity Analysis – Scenario 2: Most Suitable Jobs Approach: Cashiers and Ushers, Lobby Attendants, and Ticket Takers

Mr. Streeter's diminished future earning capacity (DFEC) was then calculated when using the average wage of the 2 most suitable occupations listed above with the direct placement approach: cashiers and ushers, lobby attendants, and ticket takers. The average wage of the 2 most suitable occupations through direct placement was seen as being representative of Mr. Streeter's post-injury earning capacity when considering all available medical and vocational information under the most suitable jobs approach for Scenario 2.

I. Worklife Expectancy

- A. Maximum medical improvement date: 11/21/08 (Gregson); 12/22/08 (Green); 2/6/09 (White); 3/17/09 (Springle); 11/15/10 – knees (Green)

Age on 11/15/10: 50 years, 1 month

Worklife expectancy on 11/15/10: 11.61 years (Skoog & Ciecka, 2001)

II. Pre-injury Earning Capacity

- A. As noted above, Mr. Streeter's pre-injury earning capacity is represented by the average of his 2004 and his annualized 2005 wages from all employers on his W-2 Wage and Tax Statements. The average wage for 2004 and 2005 is \$50,997.34, which is equal to \$24.51 per hour for a 40-hour workweek.
- B. Assume benefits as a percentage of wages to be comparable (pre-injury and post-injury).

III. Post-injury Earning Capacity – Scenario 2: Average Wage of the 2 Most Suitable Jobs Through Direct Placement

- A. The most suitable jobs approach was used for Scenario 2, and the average wage for the 2 most suitable jobs through direct placement was seen as representing Mr. Streeter's post-injury earning capacity.
- B. The average wage of the 2 most suitable jobs at the 50th percentile was used as Mr. Streeter's average wage for the first 3 years of employment. His wage will increase to the 75th percentile after 3 years of new employment.
- C. Benefits are assumed to be comparable (post-injury and pre-injury).
- D. Assume Mr. Streeter would return to work after 6 months of job search activities

following his maximum medical improvement date, approximately 7/1/11, with professional counseling assistance.

- E. Hourly wage for the first 3 years of new employment \$8.39
- F. Hourly wage after 3 years of new employment: \$10.05
- G. Average hourly wage for the first 3.5 years (6 months for job search followed by 3 years of employment):

$$\$8.39 + \$10.05 \div 2 = \$9.22 \times 3 \text{ years} = \$27.66 \div 3.5 \text{ years} = \$7.90$$

- H. Wages for remainder of worklife, post-injury:

$$11.61 \text{ years} - 3.5 \text{ years} = 8.11 \text{ years} \quad \$10.05$$

IV. DFEC Calculation – Scenario 2: Average Wage for the 2 Most Suitable Jobs Through Direct Placement

- A. Wages for the first 3.5 years:

$$\$7.90 \times 2,080 \times 3.5 \text{ years:} \quad \$57,512.00$$

- B. Plus wages for the next 8.11 years:

$$\$10.05 \times 2,080 \times 8.11 \text{ years:} \quad \$169,531.44$$

- C. Equals total FEC (post-injury earning capacity): \$227,043.44

- D. Pre-injury earning capacity beginning at MMI date:

$$\$24.51 \times 2,080 \times 11.61 \text{ years:} \quad \$591,884.80$$

- E. Less post-injury earning capacity: \$227,043.44

- F. Equals DFEC: \$364,841.36

- G. Percentage of DFEC: 62%

- H. Job search costs:

$$\begin{aligned} &\$6,750.00 \text{ for counselor fees (45 hours at \$150.00 per hour)} \\ &+ \$1,000.00 \text{ for mileage:} \end{aligned} \quad \$7,750.00$$

- I. Percentage of DFEC, when considering training and job search costs: 63%

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The resulting percentage of DFEC for Mr. Streeter can be used as a substitute for the permanent disability rating in the 2005 *Schedule for Rating Permanent Disabilities* since the percentage of DFEC considers physical impairment, age, occupation, and earning capacity, unless the DFEC percentage is less than the rating under the *Schedule* after adjusting for age, occupation, and FEC. An alternative would be to use the DFEC percentage as a substitute for the FEC adjustment factor in the *Schedule*. Or, the percentage of DFEC for Mr. Streeter can be applied to the formula at page 1-6 in the 2005 *Schedule for Rating Permanent Disabilities* when combined with the unadjusted permanent disability rating.

Summary and Conclusions

A diminished future earning capacity evaluation was conducted to assess the impact of Cameron S. Streeter's work injury on his employability and earning capacity.

Medically, Mr. Streeter sustained a cumulative trauma injury which culminated on 11/26/05, his last date of employment for Rugged Iron Company, Inc. Multiple body parts were affected and he has undergone numerous surgeries. In 1/84, he underwent a right inguinal hernia repair. He underwent right knee surgery on 11/25/92, 1/3/06, and 1/19/09. He underwent left knee surgery on 1/18/95. He underwent a left carpal tunnel repair on 8/6/98 and a left carpal tunnel repair on 5/13/99. Information regarding functional limitations, work restrictions, psychiatric impairments, and whole person impairments is outlined in the body of the report.

Academically, Mr. Streeter is a high school graduate. He attended junior college briefly.

Vocationally, Mr. Streeter worked briefly as an assembler of frames and cabinets for electronics equipment. From 1980 to 11/26/05, he worked as a union iron worker. During part of this time, he worked as a foreman.

The results of the standardized tests indicate normal color vision. Mr. Streeter reads at the 7th grade level, spells at the 6th grade level, and performs math computations at the 8th grade level. His estimated intellectual functioning is low average. His finger dexterity is average to low. His hand-tool dexterity is high. His clerical aptitude is low average to low. His mechanical comprehension is average to low average.

The results of the transferable skills analysis showed initial pre-injury labor market access of 38% and 1,118 job matches from a database of 2,926 jobs that are frequently available in Stanislaus County where Mr. Streeter had some of the skills required for employment. His post-injury labor market access was 12%, which included 342 job matches from the database of jobs.

Under an alternative work history profile analysis that did not include test scores, Mr. Streeter had pre-injury labor market access of 4%, which included 105 jobs from the same database of 2,926 jobs that are frequently available in Stanislaus County where he had some or all of the skills required for employment. His post-injury labor market access was 1%, which included 39 job matches from the database of jobs. Examples of job matches were provided.

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For reasons indicated above, when considering all of the medical and vocational information, Mr. Streeter is able to benefit from vocational rehabilitation services.

Mr. Streeter's medical labor market access as well as his vocational labor market access and placeability were analyzed in reference to *LeBoeuf* and Labor Code section 4662 and in reference to *Almaraz/Guzman*. His medical labor market access was assessed while considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle as the agreed medical evaluators. When considering all of the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle, it was learned that Mr. Streeter has access to 15.22% of jobs in Stanislaus County.

Mr. Streeter's vocational labor market access and placeability were also evaluated when considering a combination of medical and vocational factors. The vocational factors are outlined in the Vocational Labor Market Access and Placeability section of the report. In this instance, it was learned that Mr. Streeter would continue to have access to a variety of jobs in the open labor market based when considering all of the medical and vocational information.

Labor market research was also conducted to determine whether or not job openings exist in the open labor market that are compatible with the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle along with vocational factors affecting employability. As a result of the labor market research, job openings were identified in and near Manteca Jose, California that appear to be suitable for Mr. Streeter. The jobs that appear most promising from the labor market research include customer service representative, packager, lobby attendant, box office/ticket taker, receptionist/cashier, and drafter following training.

Mr. Streeter's diminished future earning capacity was then evaluated under 2 scenarios when considering the 7/29/11 *Ogilvie* decision. For Scenario 1, while using the wage for the occupation of drafter following vocational training and job placement services, it was learned that Mr. Streeter's diminished future earning capacity is 37%. For Scenario 2, while considering the occupations of cashiers and ushers, lobby attendants, and ticket takers through the direct job placement approach, it was learned that Mr. Streeter's diminished future earning capacity is 63%.

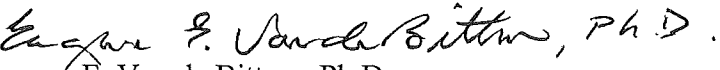
As a result of the diminished future earnings capacity evaluation, to a reasonable degree of vocational probability, when considering the opinions of Dr. Green, Dr. Gregson, Dr. White, and Dr. Springle together with the vocational factors, Mr. Streeter is able to benefit from vocational rehabilitation services and is able to compete in an open labor market. His diminished future earning capacity ranges from 37% to 63%.

I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true. In accordance with Labor Code Section 5703 (a) (2), there has not been a violation of Labor Code Section 139.3, and the contents of the

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report are true and correct to the best of my knowledge. This statement is made under penalty of perjury.

Sincerely,


Eugene E. Van de Bittner, Ph.D.
President/Rehabilitation Consultant
Certified Rehabilitation Counselor
Certified Life Care Planner
Certified Vocational Expert

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Enclosures: Record Review, 7/13/11
McCroskey Transferable Skills Program
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